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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BENSALEM TOWNSHIP; DAVID GARY COSTELLO; JOSEPH FRANCANO; JOHN J. MAHER, JR.; JOSEPH RYAN,

Petitioners,

vs.

BLANCHE ROAD CORPORATION, A PENNSYLVANIA CORPORATION, GENERAL PARTNER AND TRADING AS BLANCHE ROAD ASSOCIATES, I, A PENNSYLVANIA LIMITED PARTNERSHIP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. In order to establish a Fourteenth Amendment substantive due process claim based upon the arbitrary and capricious conduct of local government employees, must a plaintiff show a deprivation of a property interest defined by state law?

2. Has a developer whose applications for land development permits were delayed by the arbitrary and capricious conduct of local government officials but who nonetheless received those permits within the time period established by state law suffered a deprivation of a property interest which is protected by the substantive component of the due process clause of the Fourteenth Amendment?

3. Does the doctrine of ripeness apply to a federal court's jurisdiction of a developer's substantive due process claim based upon arbitrary and capricious conduct in local land use regulation?

4. Does the doctrine of ripeness bar a federal court's jurisdiction of a developer's substantive due process claim for lost profits on lots where the developer did not request development permits from the local government's final decision-making entity?

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REPORTED OPINION

The opinion of the Court of Appeals in this case appears at 53 F.3d 592.

STATEMENT OF JURISDICTION

Petitioners seek review of the order and opinion of the United States Court of Appeals for the Third Circuit filed on May 26, 1995.

By order dated June 21, 1995, the Court of Appeals denied the petitions for rehearing of petitioners.

On July 14, 1995, the Court of Appeals ordered that, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, its mandate was stayed until July 28, 1995.

By order dated July 21, 1995, the Court of Appeals ordered that the stay of its mandate was extended until August 11, 1995.

This Honorable Supreme Court has jurisdiction of the instant petition pursuant to 28 U.S.C. §1256. The Court of Appeals had jurisdiction of this matter pursuant to 28 U.S.C. §1291. The District Court had jurisdiction of this action pursuant to 28 U.S.C. §§1331 and 1343 and the Federal Civil Rights Act, 42 U.S.C. §1983.

LEGAL PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

53 Pennsylvania Statutes Section 4104(a):

A municipality which regulates the construction, erection, maintenance, operation or repair of buildings, structures or devices by means of an ordinance requiring the filing of an application, the payment of a fee and the issuance of a permit shall render a decision either approving or disapproving the application for a permit within 90 days after the application is filed unless the ordinance requires a decision within a lesser period of time, provided that any disapproval of the application shall be issued within said 90-day period containing a brief explanation setting forth the reasons for said disapproval and the manner in which the application can be corrected and/or modified to obtain the required approval. If no decision is rendered on the application within 90 days, the application shall be deemed to be approved and the permit shall be deemed to have been granted immediately, unless the applicant has agreed in writing to an extension of time. No agreement to extension of time for action may be made a part of an application form nor may any such agreement be required of any applicant under threat of denial of the application.

STATEMENT OF THE CASE

Procedural History

Petitioners adopt the procedural history in the Opinion of the Court of Appeals. (A-17-21)

Statement of Facts[1]

Bensalem Township is located in Bucks County in southeastern Pennsylvania. Bensalem Township is a Second Class Township, i.e. a population density of less than 300 persons per square mile. During the relevant time period, the chief legislative and executive body of Bensalem Township was a Board of Supervisors. The Board consisted of five elected Supervisors who were responsible for the "general administration of the affairs of the Township". 53 Pa.C.S.A. 65510. Supervisors in Bensalem Township were not full-time employees. They were paid $4,000.00 per year. They met every other Monday evening in a public meeting which was open to all citizens. The Supervisors did not have individual executive or legislative authority; they could only act sitting as a body of the whole at public meetings. 53 Pa.C.S.A. 65512, 65513. The Pennsylvania Second Class Township Code authorizes second class townships to retain professional consultants such as a Township Solicitor and a Township Engineer. 53 Pa.C.S.A. 65581 and 65585. These professionals are not employees of the Township; they provide services upon request and are paid for those services.

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[1]The statement of facts; although concise,is lengthy. Most land use regulation cases arise at the beginning of the land development process, such as a zoning change or an application for subdivision approval. The instant case involves the actual development of a 23 lot subdivision over three years with multiple conflicts arising over the issuance of land alteration, building and use and occupancy permits for the individual lots.

In 1972, Blanche and Adam Talacki received approval from Bensalem Township to subdivide an unimproved tract of land into 32 separate lots. Mr. and Mrs. Talacki developed only 9 lots. On May 2, 1986, Mr. and Mrs. Talacki formed a partnership with Margaret and Walter Czekay with the intent of completing the development of the tract. The partnership was named "Blanche Road Associates" and the tract was named "Blanche Road Industrial Park."[2] Blanche Road Associates (hereinafter "Respondent") intended to erect industrial warehouses on the remaining 23 lots.

The Talackis retained ownership of the 23 undeveloped lots. Respondent purchased from the Talackis one lot, Lot 29, and separate options to purchase each of the remaining 22 lots. The term of each option was four years. Respondent built, on speculation, an industrial warehouse on Lot 29 and sold Lot 29 as an improved lot. Respondent then exercised its option, and purchased and developed 11 more lots. However, Respondent and the Talackis did not renew the options when they expired on May 2, 1990. Respondent ceased further development work in 1990 leaving 13 lots undeveloped. Respondent developed Lots 7, 8, 10, 12, 13, 14, 15, 25 and 26 (the "Developed Lots"). Respondent did not develop Lots 6, 11, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27 and 34 (the "Undeveloped Lots"). (DL-4)[3]

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[2]Blanche Road Associates was a limited partnership with Mr. and Mrs. Talacki and Mr. and Mrs. Czekay being the limited partners. The Talackis and the Czekays also formed a corporation, Blanche Road Corporation, which became the general partner for Blanche Road Associates.

[3]Petitioners have lodged with the Court several documents which could not be included in the Appendix because of their size and configuration. Petitioners wish to bring these documents to the Court's attention, and they are cited with the prefix "DL" for "documents lodged."

The Bensalem Township Zoning Ordinance provides that after subdivision approval, a developer must obtain three permits to complete development of each lot - a land alteration permit, a building permit and a use and occupancy permit. Land alteration permits were issued by the Board of Supervisors while building and use and occupancy permits were issued by the Department of Licenses and Inspections. The permitting process in Bensalem Township is accurately described in the Court of Appeals Opinion at A-9-10.

Respondent claimed that employees of Bensalem Township arbitrarily and capriciously interfered with the permitting process, causing delays in the development of the Developed Lots and losses of $596,000.00. More importantly, Respondent claimed that it was so discouraged and stressed by the arbitrary and capricious conduct of Bensalem Township in dealing with the Developed Lots, it chose to close up operations, not renew the option agreements and simply walk way from Undeveloped Lots, leaving them completely undeveloped. Respondent seeks lost profits for the Undeveloped Lots in the amount of $8.1 million! The total claim was $8.7 million. (A-40-42)[4]

For 1992, 1993 and 1994, Bensalem Township's general fund revenues were $8.8 million, $12.2 million and $11.4 million, respectively.[5] General fund revenues are non-dedicated revenues available to the Township to provide services such as police, recreation and code enforcement. Respondent's total damage claim of approximately $8.7 million, together with recoverable counsel fees of at least $1 million,

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[4]A-40-42 is taken from Respondent's Final Pretrial Order filed prior to the second trial pursuant to Eastern District of Pennsylvania Local Rule 21(d)(2)(b).

[5]Bensalem Township's budgetary figures were not exhibits at either trial. However, they are a matter of public record.

would, if successful, render Bensalem Township unable to provide government services, including police services, for an entire year.

Although Respondent originally presented substantive due process claims, procedural due process claims and equal protection claims, the procedural due process claims and equal protection claims were dismissed by the District Court and Respondent has not appealed that dismissal. Only the substantive due process claim is at issue in this Petition.

Bensalem Township does not have a local ordinance which establishes a time limit in which to approve land use permit applications. However, Pennsylvania has a "deemed approval" statute which requires a municipality to act on a land use permit application within 90 days or the application is deemed approved. 53 Pa.C.S.A. 4104. (A-39) The deemed approval statute is enforceable by an action in mandamus. Rodier vs. Township of Ridley, 595 A.2d 220 (Cmwlth. 1991).

Petitioners have prepared a Table which shows the permit history for most of the developed lots, i.e., when each of the three permits was applied for and when they were granted. (DL-5) The record is silent as to the permit dates for some developed lots, which silence is indicated in the Table by the acronym "NITR" (not in the record).

The Table shows the application dates for 21 permits.[6] Seventeen were approved within 90 days and four were approved after 90 days. The record does not show the dates for the three permits for Lot 29 or the land alteration and building permits for Lot 7. Because these lots were successfully

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[6]The use and occupancy Permit for Lot 7 is not included because Respondent actually used and occupied the lot before applying for a permit. The date for Land Alteration and Building permits is always the same because respondent always applied for those permits simultaneously.

developed, it is likely that these permits were timely issued. Therefore, it is probable that 5 more permits were timely issued (3 for Lot 29 and 2 for Lot 7) so that the likely figures are 23 permits issued within 90 days and 4 permits issued after 90 days. Bensalem Township's compliance rate was therefore 85%. Respondent never filed an action in mandamus to compel the issuance of the 4 late permits; however, they were issued anyway.

Respondent introduced at trial 12 permits which were issued to other applicants in less than 90 days. However, during the period that Respondent was actively developing lots (1987 through 1990), Bensalem Township received at least 2,000 applications for land alteration permits. There was no testimony from any witness to establish a custom or practice in Bensalem Township to approve permit applications in less than 90 days.[7] Accordingly, Respondent did not prove an entitlement to receive permits in less than 90 days.

The alleged arbitrary and capricious conduct of Bensalem Township employees, as described in the Opinion and, where appropriate, supplemented from the record, is as follows:

1. THE MEMO On May 27, 1987, Respondent applied for land alteration and building permits for Lot 13. The applications were initially rejected and the Fire Marshall placed a note in the file which read:

> C.W.-S.II-No sprinklers-can you get them on something else?

However, the permits were granted in July of 1987, within the 90-day period. Respondent did not claim any damages with

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[7]Respondent had ample opportunity through extended discovery before both trials to find such evidence but was unable to do so.

respect to Lot 13 for any delay in the issuance of these permits. Whatever the meaning of the note, it caused Respondent no harm.

2. THE IMPACT TAX On October 15, 1987, Respondent applied for land alteration and building permits for Lots 14 and 26. The permits were held up by the Department of Licenses and Inspections ("L&I") for Respondent's failure to pay an impact tax. On June 15, 1987, Bensalem Township adopted an Ordinance which assessed commercial developers an impact tax of $.80 per square foot of proposed floor area. Respondent claimed an exemption from the tax because the subdivision approval in 1972 preceded its enactment.

The legal issue of whether the tax applied to Respondent was submitted to the Township Solicitor who issued an informal opinion that Respondent was correct. L&I then waived the impact tax and permits were issued in November of 1987. Respondent did not claim any damages with respect to Lots 14 and 16 for any delay in the issuance of these permits. By simply "appealing" to the Township Solicitor, Respondent ameliorated the initial unsatisfactory decision of L&I.

3. THE THREAT In December of 1987, Walter Czekay met with the Director of L&I, Mr. Staerk, the Township Engineer, and the Township Zoning Officer. According to Mr. Czekay, Mr. Staerk threatened that if Respondent did not pay impact fees, Mr. Staerk would stop construction. However, there was no testimony that Mr. Staerk ever took such action. No witness testified that he was asked or instructed by Mr. Staerk to take any action unfavorable to Respondent.

4. THE ENVIRONMENTAL ISSUE On December 22, 1987, a Code Enforcement Officer in L&I, William Oettinger, issued a stop work order for all construction. As of December 22, 1987, the lots under construction were 13, 14 and 26. Mr. Oettinger based his stop work order on violations of erosion and sedimentation control measures which were conditions of the land alteration permits issued for those lots.

Although respondent contested the validity of the stop work order, the Opinion states: (A-21)

> Moreover, it is undisputed that erosion and sedimentation control violations did exist in the Industrial Park area when the stop work orders were issued.

The Bucks County Conservation District ("BCCD"), an agency of the Pennsylvania Department of Environmental Resources, inspected the Industrial Park on January 27 and February 22, 1988 and both times found violations of state administrative regulations for erosion control. (DL-6,7) On February 8, 1988, Mr. Oettinger revoked the land alteration and building permits for Lots 13, 14 and 26 upon the recommendation of the Township Solicitor which stated:

> In light of the above, we have recommended that all existing permits, both alterations of land and building, be revoked, due to the current violations of state and local law. Along with enforcement of the Bucks County Conservation District, we believe this is the only method which will force compliance in this case.

On February 18, 1988, Respondent filed an action in state court to force the reissuance of the permits.[8] On February 26, 1988, Bensalem Township agreed to the reissuance of the permits in exchange for Respondent's agreement to comply with the soil erosion requirements of the BCCD. This Agreement was recorded in a court-approved Stipulation, which was a negotiated victory for both sides. (A-66-70) Respondent received its permits and Bensalem Township received assurance that Respondent would respect the environment. Like the

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[8]The Opinion at A-13 states that the state court action was filed on February 28, 1988. The correct date was February 18, 1988.

impact fee dispute, negotiation produced an amelioration of an initial conflict.

5. THE LAND ALTERATION vs. LAND DEVELOPMENT DISPUTE When Respondent filed applications for land alteration permits for Lots 8, 10, 11, 12, 15 and 21[9], the Township Engineer recommended to the Board of Supervisors that the applications be denied because Respondent had not complied with the Bensalem Township 1982 Land Development Ordinance. (A-71-78)[10] The requirements of the Land Development Ordinance were considerably more onerous than those of the Land Alteration Ordinance.

The Township Engineer, Mr. Scheuren, testified that he applied the Land Development Ordinance at the direction of three Supervisors, Mr. Ryan, Mr. Costello and Mr. Maher, and that they asked Mr. Scheuren to "slow down" Respondent's development because of their personal dislike for Walter Czekay. Mr. Scheuren was the only witness who testified that the three Supervisors expressed personal animosity against Respondent. Mr. Scheuren's credibility was impaired by the fact that he had been convicted of the state court crime of False Swearing (18 Pa.C.S.A. 4903) and was sentenced to a prison term.

Respondent disagreed with the Township Engineer's recommendation on the theory that the 1972 subdivision gave respondent a "grandfather" exemption from the 1982 Land

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[9]Lot 10 is a parking lot which is adjacent to Lot 8.

[10]A-71-78 are three of the letters of the Township Engineer citing failure to comply with the Land Development Ordinance.

Development Ordinance.[11] Land alteration permits are issued by the Board of Supervisors. Respondent appeared before the Board of Supervisors to request that they disregard the recommendation of the Township Engineer and issue the land development permits. The Board of Supervisors, including Mr. Ryan, Mr. Costello and Mr. Maher, agreed and unanimously voted to approve all of the disputed alteration permits. The Board of Supervisors approved the land alteration permit application for Lot 12 on June 6, 1988 and for Lots 8, 10, 11, 15 and 21 on April 17, 1989.

The stenographic transcription of the proceedings from the April 17, 1989 meeting of the Board of Supervisors (A-42-65) shows that Respondent and its counsel negotiated directly with the Township Solicitor to achieve a settlement of the permit dispute. Respondent agreed to add several "notes" to the plans for the lots under consideration, whereupon the Board of Supervisors unanimously approved the permits. Like the disputes over the impact tax and environmental violations, negotiation produced a compromise which was satisfactory to both sides.

6. CONDITIONAL BUILDING PERMITS In 1988, Bensalem Township retained a new Township Solicitor and the issue of the impact tax re-surfaced. The application of the impact tax to Respondent's development was openly discussed at the April 17, 1989 Board of Supervisors meeting. The parties agreed to defer the issue of the applicability of the tax and for Bensalem Township to issue the building permits without

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[11]Respondent's position was of questionable validity. In 1972, Pennsylvania allowed developers only three years to complete a subdivision and retain immunity from subsequent zoning legislation. Because the Talackis did not complete their subdivision by 1975, they were then subject to further zoning legislation by Bensalem Township and, in particular, the 1982 Land Development Ordinance. 52 Pa. C.S.A. 10508 (4), Atland v. Sprenkle, 472 A.2d 275 (Cmwlth. 1981).

Respondent paying the tax. On May 1, 1989, the Township Solicitor wrote to Respondent's counsel and stated:

> (1) The Township will not revoke the building permits merely for non-payment of the tax at this time; (2) The Township will not withhold a Certificate of Occupancy merely on the basis of the non-payment of the tax; (3) The Township and the Developer reserve rights to file declaratory judgment actions to test the validity of the taxing ordinance as it is related to any construction after the effective date of the original Ordinance and/or any subsequent amendments.

L&I then issued building permits for Lots 8, 12, 15 and 21 with the following legend:

> This is a conditional permit only. Bensalem Township reserves its' right to collect contributions due and owing to the Township Highway Improvement Funds because the extension contract for the subject development was approved after the effective date of Ordinance No. 367, adopted June 15, 1987, as amended.[12]

The Pennsylvania Municipalities Planning Code ("Code") includes under the generic heading of "Zoning" regulation of the construction of buildings. 53 Pa. C.S.A. 10603(b)(2). Therefore, action taken by L&I in response to an application for a building permit is a determination by a "zoning officer" within the meaning of the Code. 53 Pa.C.S.A. 10909.1. Determinations by a zoning officer on an application for a building permit are appealable to the township Zoning

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[12]The "conditional" building permit for Lot 21 is at DL-6.

Hearing Board for a de novo review.[13] 53 Pa. C.S.A. 10909.1(a)(3). In Taylor Investment, Ltd. vs. Upper Darby Township, 983 F.2d 1285 (3rd Cir. 1993), the Court held that the Zoning Hearing Board is the municipal entity in Pennsylvania with "finality" for the issuance of building permits.

If Respondent believed that the legend on the building permits would cause it harm, Respondent had the opportunity to appeal to the Zoning Hearing Board and request removal of the legend. However, Respondent did not appeal.

7. LOT 7 Mr. Scheuren testified that one of the Supervisors, Mr. Maher, instructed him to prepare a "punch list" before the issuance of a use and occupancy permit for Lot 7 and to look for every possible code violation and environmental violation. However, Mr. Scheuren admitted that he was not asked by the Supervisors to prepare any dishonest comments and that, although he carefully scrutinized Lot 7, his recommendations were fair and accurate.[14]

The dispute over the punch list for Lot 7 was amicably resolved through negotiation and included in the court-approved Stipulation which also resolved the environmental dispute. (A-

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[13]Under Pennsylvania law, a township Zoning Hearing Board is an independent entity separate and apart from other institutions of township government. 53 Pa. C.S.A. §10901 et seq.

[14]The "issue" of the use and occupancy permit for Lot 7 was actually a non-issue because Respondent suffered no damages from the punch list. Lot 7 was a rental property where Respondent erected two commercial warehouses and rented them to tenants. Respondent allowed both tenants to commence occupancy before Respondent obtained a use and occupancy permit. During the entire dispute over the punch list, the warehouses were occupied and the tenants paid rent.

66-70) Respondent agreed to correct most of the items on the punch list in exchange for Bensalem Township's agreement to issue the use and occupancy permit.

The history of conflict between Respondent and Bensalem Township, as described above, is more typical than terrible. Except for the conditional building permits for Lots 8, 12, 15 and 21, all disputes were resolved promptly and through negotiation. Respondent's anticipated profit for the Undeveloped Lots alone was $8.1 million. It was not unreasonable to expect Respondent to spend some time negotiating disputed issues. The only dispute not resolved to Respondent's satisfaction, the conditional building permits, was not submitted to the next higher authority, the Zoning Hearing Board. The record demonstrates Bensalem Township's willingness to negotiate with Respondent and, when asked, to ameliorate any initial decision which Respondent deemed harsh or unfair.

ARGUMENT

I. The Court Of Appeals Erred By Concluding That Respondent's Substantive Due Process Rights May Have Been Violated In The Absence Of Deprivation Of Any Protected Property Interest.

The Court of Appeals determined that Respondent had a substantive due process right to the issuance of permits by Petitioner township in less time than issuance is mandated under state or local law. In so doing, the court expressly bypassed state law governing the issuance of permits and extended the substantive due process protection of property interests in a manner contrary to the precedents of this Court.

The principle that due process concerns arise only in relation to the deprivation of protected rights is rooted in the language of the Constitution. The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty or property, without due process of law..." This language echoes the Fifth Amendment guarantee against such deprivations by the federal government.

Nowhere does the Constitution establish due process protection as an independent right available for the enforcement of general notions of fairness. Rather, that protection is derivative, in the sense that it comes into play only when an individual's right to his or her life, liberty or property is at stake. Regents of University of Michigan v. Ewing, 474 U.S. 217, 222-23, 106 S.Ct. 507, 511-12 (1985)(arbitrary deprivation of protected property interest constitutes substantive due process violation); Parratt vs. Taylor, 451 U.S. 527, 537-38, 101 Supreme Court 1908, 1913 (1981)(deprivation of property without due process of law violates Fourteenth Amendment); Board of Regents of State College vs. Roth, 408 U.S. 564, 571, 92 Supreme Court 2701, 2705 (1972)(due process requirements apply only to the deprivation of protected liberty and property interests).

While Parratt and Roth address procedural claims, this Court left no doubt in Ewing that, although not all property interests give rise to substantive constitutional protection, it is the arbitrary deprivation of a protected interest that gives rise to a substantive due process violation. 474 U.S. at 22-23, 106 S.Ct. at 511-12.

Respondent claims a substantive due process violation based upon the arbitrary and capricious conduct of local government. However, arbitrary and capricious conduct in and of itself does not perfect a substantive due process claim. In addition to improper conduct, a plaintiff must also establish a deprivation of a property interest protected by the Fourteenth Amendment. The two step process for proving a substantive due process claim has been described by the Eleventh Circuit in Reserve, Ltd. v. Town of Longboat Key, 17 F.3rd 1374, 1379 (11th Cir.1994), as follows:

> First, was the plaintiff deprived of a constitutionally protectible property interest? [...] Second, assuming a property interest, was the deprivation of that "property interest for an improper motive and by means that were pretextual, arbitrary and capricious, and ... without any rational basis[?]" Hearn v. City of Gainsville, 688 F.2d 1328, 1332 (11th Cir.1982).

(First bracket added, second in original.)

To establish the parameters of a constitutionally protected property interest in a substantive due process claim, the Eleventh Circuit relied on this Court's decision in Roth, supra, at 408 U.S. 564, 577, 92 S.Ct. 2701, 2709:

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that secure certain benefits and

that support claims of entitlement to those benefits.

53 Pennsylvania Statutes, Section 4104 provides permit applicants--and Pennsylvania municipalities--with a limit on the time issuance or rejection of a permit may take. Pursuant to Section 4104, an applicant has automatic or deemed approval of any permit whose application is not issued or denied within 90 days.

Section 4104 is the only Pennsylvania authority that governs the time for issuing such permits. Bensalem Township does not have an Ordinance on the subject.

Of the more than 20 permits of record for which Respondent applied before abandoning its development, only 4 were issued after the expiration of the 90 day statutory period. No formal demand was made to the township regarding these delayed permits, which were issued promptly when Respondent's principal pointed out that he believed he had grounds for a mandamus action.

Nonetheless, the Court of Appeals determined that Respondent had made out a prima facie case that township officials deliberately and arbitrarily delayed issuance of all the permits and ordered this case remanded for a third trial on plaintiff's claims of substantive due process.

The Court of Appeals bypassed a determination of whether plaintiff had been deprived of a protected property interest. Absent from the Opinion is any mention of the property right upon which the court bases its conclusion that Respondent stated a viable claim. Pursuant to this Court's decision in Roth, the source of such a property right is necessarily state law: but, as noted, neither Pennsylvania nor Bensalem Township requires that permit applications be approved or denied in less than 90 days.

The Court of Appeals states (A-30):

> The "deemed approved" statute, however, does not foreclose damages based upon intentional delays in the issuance of permits. One need only consider a hypothetical situation in which officials, seeking to sabotage a developer's project, intentionally withheld each permit for 89 days or for an even longer period until the applicant would take legal steps. Such deliberate and arbitrary delays could cause significant additional expense to the developer.

The concern of the court regarding possible abuse of discretion by permitting officials, while understandable, is not based upon a property right to issuance of permits in less than 90 days. To the contrary, the Pennsylvania Legislature has accorded Commonwealth citizens a right to permit approval only after the 90 day period has expired without any action by the municipality. No applicant is entitled to issuance or denial of a permit under Pennsylvania law in 89 days, or in 88 days, or in any lesser amount of time, regardless of whether the determination could be made earlier.

The 90 day period is designed to insure municipalities sufficient time in which to make permit decisions. The Township Engineer of Bensalem Township testified that more than 2,000 applications for land alteration permits alone (not counting applications for building permits and use and occupancy permits) were submitted to him from mid-1987 to early 1990, when almost all of Respondent's development activity took place. The sheer number of these applications supports the wisdom of the Pennsylvania legislature in selecting 90 days as an appropriate time period to make permit determinations and provide a buffer against deemed approvals and/or lawsuits by impatient developers. Notably, respondent does not contend that the 90-day limit in the deemed approval statute is constitutionally unacceptable.

In effect, the Court of Appeals has created for Respondent a property right or entitlement where none existed so as to implement general considerations of fairness under the rubric of substantive due process. Moreover, it unaccountably contradicted its previous opinions, which left little doubt that the determination of a protected property interest is indispensable for a due process violation. DeBlasio v. Zoning Board of Adjustment, 53 F.3rd 592 (1995) (fundamental property interests are protected by substantive due process); Taylor Investment, Ltd. v Upper Darby Township, 983 F.2d 1285, 1292 (3rd Cir.1993)(substantive due process plaintiff must show deprivation of protected property interest by arbitrary and capricious act); Bello v. Walker, 840 F.2d 1124 (1988)(arbitrary and capricious act depriving plaintiff of right to permits established by state court states substantive due process claim).

By eliminating the need to prove a deprivation of a property interest defined by state law, the Court of Appeals made liability turn solely on Petitioners' alleged improper motivation. However, the Constitution does not require that local government officials love or even like their constituents. The Constitution protects property interests, not municipal goodwill. Conduct which does not cause a deprivation of a protected property interest, no matter how mean-spirited, is not sufficient to establish a substantive due process claim.

Arguably, plaintiff's allegations of intentionally disparate treatment of its permit applications within the 90 day period might support an equal protection claim. However, plaintiff chose not to appeal the dismissal of its equal protection claims in the first trial of this matter. Nor, after two trials of this case, each preceded by a discovery period, has plaintiff been able to produce legally sufficient evidence indicating that permitting officials regularly issued permits to other developers

in substantially less time than to plaintiff -- much less to developers similarly situated to plaintiff.[15]

In sum, the Court of Appeals erred in concluding that respondent's claims of delay are grounded in any legitimate entitlement to the permits and that it could have been deprived of its substantive due process rights by their issuance in less than 90 days.

II. The District Court Correctly Applied The Ripeness Doctrine To Preclude Respondent From Recovering Damages For Those Lots Where Respondent Did Not Request Permits From Bensalem Township's Final Decision-Making Authority.

The Due Process Clause of the Fourteenth Amendment was "intended to secure the individual from the arbitrary exercise of the powers of government. Daniels vs. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665 (1986). The Courts of Appeal have developed the doctrine that arbitrary and capricious conduct by local government officials which deprives a land owner of a protected property interest constitutes a substantive due process violation. Edie v. Sarasota County, 908 F.2d 716, 721-2 (11th Cir. 1990), Bello v. Walker, 840 F.2d 1124, 1128-30 (3rd Cir. 1988), South Gwynnett Venture v. Pruitt, 491 F.2d 5,7 (5th Cir. 1974).

In 1985, this Court in Williamson County Regional Planning Commission vs. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 105 S.Ct. 3108, 3116 (1985) applied the doctrine of ripeness to a claim for damages from local land use regulation. This Court stated:

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[15]Plaintiff introduced at the second trial a mere twelve permits, out of the thousands issued during the time of its development activities, issued in less time than its own.

> As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

Since Williamson, several Courts of Appeal have applied the ripeness requirement to substantive due process claims based upon alleged arbitrary and capricious conduct in local land use regulation. In Landmark Land Company of Oklahoma, Inc. vs. Buchanan, 874 F.2d 717 (10th Cir. 1989), a developer alleged that local government officials conspired with Air Force officers to impede and ultimately prevent the commercial development of its property. The allegations of a malicious conspiracy in Landmark are similar to Respondent's allegations of a malicious conspiracy existing in Bensalem Township. The Tenth Circuit applied Williamson and rejected the claim as unripe. The court stated:

> Landmark could recover on its substantive due process claim if it could show that Del City deprived it of property in an arbitrary fashion....Before a federal court may step in and ascertain whether a local planning authority has taken property arbitrarily, however, it must allow the local authority a chance to take final action. Until it has a final action before it, the court is unable to calculate whether property was taken and whether the local authority's position was arbitrary. Thus, the Williamson County ripeness test applies with equal force to substantive due process claims.

Id., at 722.

Landmark was followed by the Second Circuit in Southview Associates, Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992). In Southview, the Court stated:

> Southview's substantive due process claim premised on arbitrary and capricious government conduct, however, is subject to only the final decision prong of the Williamson ripeness test. Unless a court has a final decision before it, it cannot determine whether a claimant was deprived of property and whether the government conduct was arbitrary and capricious.

Id., at 96-97.

The Ninth Circuit, in Herrington vs. Sonoma County, 834 F.2d 1488, 1494 (9th Cir. 1987) and the Eleventh Circuit in Edie, supra, also applied Williamson to a substantive due process claim based upon arbitrary and capricious conduct.

In the instant case, Respondent did not apply for any permits for Lots 6, 16, 17, 18, 19, 20, 22, 23, 24, 27 and 34. Bensalem Township was not given an opportunity to determine how it would apply its permitting process to these lots and certainly was never given an opportunity to approve permit applications. Respondent's damage claim for lost profits for these lots is $6.5 million. (A-40-42)

For Lot 11, Respondent applied for land alteration and building permits on January 18, 1989, which permits were approved on April 17 and April 28, 1989 respectively. Respondent never applied for a Use and Occupancy Permit and never constructed a building on the property. Respondent's claim for damages for lost profits on Lot 11 is $568,000.00.

For Lot 21, Respondent applied for land alteration and building permits on December 20, 1988, which permits were approved on April 17 and April 25, 1989 respectively.

Respondent never applied for a use and occupancy permit and never constructed a building on the property. Respondent's claim for damages for lost profits for Lot 21 is $1 million.

Respondent seeks damages from Bensalem Township of $1.6 million for Lots 11 and 21 where all permits applied for were granted. Respondent seeks damages from Bensalem Township of $6.5 million for Lots 6, 16, 17, 18, 19, 20, 22, 23, 24, 27 and 34 where no permits were applied for, and therefore none denied. Respondents seek a total of $8.1 million from Bensalem Township for all of the Undeveloped Lots where the Township never denied a permit application and approved every permit that was requested.

As the District Court concluded, the ripeness requirement precludes Respondent from recovering for the Undeveloped Lots (except Lots 11 and 21) because there never was a final decision as to Respondent's right to develop those lots because no permits were ever applied for. The ripeness doctrine also precludes Respondent from recovering for Lots 11 and 21 because Bensalem Township did not make an unfavorable decision on the permits requested (land alteration and building) and was not given an opportunity to make a final decision on the third permit -- use and occupancy.

In the instant case, the Third Circuit has held that ripeness is not required for the following reason (A-29-30):

> For the reasons that follow, however, the ripeness requirement arising in zoning dispute cases does not apply to Blanche Road's claims and, consequently, Defendants' Rule 50(a) Motion should not have been granted...In the instant case, however, plaintiffs' claims are not dependent on a final decision from the county, since plaintiffs are not appealing from an adverse decision on a permit application. Footnote 14 [14. In fact, virtually all of plaintiffs' permit applications were ultimately

> approved.] Rather, plaintiffs are asserting that defendants, acting in their capacity as officers of the Township, deliberately and improperly interfered with the process by which the Township issued permits, in order to block or to delay the issuance of plaintiffs' permits, and that defendants did so for reasons unrelated to the merits of the application for the permits. Such actions, if proven, are sufficient to establish a substantive due process violation, actionable under Section 1983, even if the ultimate outcome of plaintiffs' permit applications was favorable... This is a substantively different type of claim than that presented in the ripeness cases, and internal review of the individual permit decisions is thus unnecessary to render such a claim ripe.

Upon approval of the subdivision, Respondent needed only the issuance of three permits (land alteration, building and use and occupancy) to complete the development of each lot. Therefore, interference by Bensalem Township employees in Respondent's development plans was necessarily an interference with the issuance of permits. The Opinion tacitly admits that the "interference" of Petitioners was an interference with the issuance of permits by stating (A-29-30):

> Rather, plaintiffs are asserting that defendants, acting in their capacity as officers of the Township, deliberately and improperly interfered with the process by which the Township issued permits, in order to block or to delay the issuance of plaintiffs' permits, and that defendants did so for reasons unrelated to the merits of the application for the permits. [Emphasis supplied]

The Opinion holds that where the initial permit interference is arbitrary and capricious, the claim is instantly ripe and that "internal review of the individual permit decisions

is thus unnecessary." However, there is no logical reason why an initial permit decision based on arbitrary and capricious conduct cannot be ameliorated when reviewed by the final decision-maker in the same way that initial decisions of benign origin can likewise by ameliorated. Indeed, the instant case demonstrates that initial adverse permit decisions, even if motivated by impermissible ill will, can be subsequently ameliorated to the satisfaction of the property owner.

The ripeness doctrine enunciated in Williamson counsels the parties to be patient. In local land regulation, it is not uncommon that an initial unfavorable determination is ameliorated in subsequent proceedings. The Federal Courts should not rush to judgment by stepping in at a preliminary or even intermediate phase of local land use regulation. The finality requirement gives local government the opportunity to reconsider what may have been an initial rash decision and come to a more moderate and well-reasoned decision.

An analysis of the evidence shows that preliminary denials of permits were subsequently ameliorated when Respondent requested a review by a second or final decision-maker. The areas of conflict described in the Statement of Facts were mostly conflicts over the issuance of permits which conflicts were resolved as follows:

1. The Memo. The memo was issued in the context of an initial denial of all three permits. The permits were subsequently issued within the 90-day period although the record is silent as to how they came to be issued.

2. The Impact Tax. The dispute over the impact tax caused L&I not to issue land alteration and building permits. The tax was removed and the permits were issued when Respondent sought a review by the Township Solicitor who issued an informal opinion in Respondent's favor.

3. The Threat. The threat by Mr. Staerk was a non-issue because there was no testimony that Mr. Staerk

personally took any action adverse to Respondent or directed or even asked any Bensalem Township employee to take action adverse to Respondent.

4. The Environmental Issue. Because of Respondent's undisputed environmental violations, the Township Solicitor recommended revocation of permits for Lots 13, 14 and 26 and those permits were revoked by L&I on February 8, 1988. On February 18, 1988, Respondent filed an action in state court which led to a negotiated settlement and a re-issuance of the permits on February 26, 1988.[16]

5. The Land Alteration vs. Land Development Dispute. The Township Solicitor recommended that Respondent's land alteration permit applications be rejected because Respondent had not complied with the Land Development Ordinance. However, the final decision-maker for land alteration permits was the Board of Supervisors and when Respondent took the matter to the Board of Supervisors, Respondent prevailed and the Board of Supervisors approved the permits.

6. Conditional Building Permits. When the impact tax issue re-surfaced, the parties negotiated an amicable resolution which provided for the issuance of the permits without Respondent paying the impact tax. L&I then issued the building permits with a legend stating that the permit was a "conditional" permit. The Zoning Hearing Board was the final decision-maker with respect to building permits but was never

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[16]In Agins v. City of Tiburon, 447 U.S. 255, 263, 100 S.Ct. 2138, 2143, Fn. 9, this Court held that fluctuations in the value of real estate during the process of governmental decision-making are, absent extraordinary delay, merely incidents of ownership. Therefore, any loss claimed by Respondent during the short delay while the parties sorted out the resolution of Respondent's environmental violations should not be compensable.

asked by Respondent to remove the legend. Respondent could have appealed to the Zoning Hearing Board but failed to do so.

7. Lot 7. The dispute over the issuance of a use and occupancy permit for Lot 7 was resolved in the Court-approved Stipulation of February 26, 1988. The amicable resolution expressed in the Stipulation was that Respondent would correct certain items on the punch list whereupon the use and occupancy permit would issue.

The record in the instant case demonstrates the wisdom of the ripeness requirement. Good faith negotiation will resolve most local land disputes without the need for premature Court intervention.

The amicable resolution of the land alteration/land development issue is the best example of the wisdom of the ripeness requirement. Even if Mr. Scheuren were correct and the Supervisors engaged in a hallway conspiracy with Mr. Scheuren to slow down Respondent's development by applying the Land Development Ordinance, when the Board of Supervisors acted in its capacity as the final decision-maker, the Board approved the land alteration permits without requiring compliance with the Land Development Ordinance. (A-71-78) When Respondent brought the issue up at a public meeting, the alleged conspirators dissolved their conspiracy and rendered a decision favorable to respondent. Respondent accomplished in two hours on a Monday evening the same result which might otherwise have taken two years of litigation and counsel fees in the hundreds of thousands of dollars. To say that resolution of this issue at the local government level is preferable to federal court litigation is to state the obvious.

The decision of the Third Circuit to dispense with the need for ripeness whenever the landowner claims arbitrary and capricious misconduct would be a disaster for local government. Developers and local land use regulators are frequently embroiled in controversy. Local land use regulators are traditionally loath to allow commercial development which

endangers the environment or displeases existing property owners who seek to preserve the status quo. If a developer can run to Federal Court every time a permit is denied, local governments will be swamped with litigation and bankrupted by legal fees. If a developer has a "ripe" claim merely upon the denial of a permit and the allegation of arbitrary and capricious conduct, developers will be able to bully local governments with the club of threatened litigation and through economic pressure force local governments into unwarranted capitulation. The ripeness doctrine forces developers and local land use regulators to sit down and "reason together" rather than race to the Courthouse.

Respondent's claim for delay damages for the lots it developed was only $600,000. By walking away from the development and choosing not to develop the remaining 13 lots, Respondent catapulted its claim to $8.7 million.

The failure of the Third Circuit to apply the doctrine of ripeness to the instant case leads to the extraordinary result that Bensalem Township may incur a liability of $6.5 million for alleged lost profits on lots where the developer never submitted one single permit application. The Township was never given an opportunity to permit development of these lots and is nevertheless being subjected to a liability of $6.5 million, more than 50% of its annual General Fund Revenue. The Township is also being subjected to additional liability for Lots 11 and 21, in the amount of $1.6 million, where it granted all of the permits requested.

The Second, Ninth, Tenth and Eleventh Circuits have all applied the doctrine of ripeness to substantive due process claims based upon arbitrary and capricious conduct. In the instant case, the Third Circuit has held that arbitrary and capricious conduct is a substantively different type of claim than the claims to which the doctrine of ripeness applies. However, there is no logical reason why the requirement of finality should not apply to initial decisions based on arbitrary and capricious motivation as compared to legitimate motivation. Decisions

based on either motivation may be ameliorated by appeal to a final decision-maker and it is that amelioration which the doctrine of ripeness encourages.

Because initial decisions in local land use regulation are so frequently ameliorated upon further consideration and submission to the final decision-making authority, the doctrine of ripeness furthers the purposes of judicial economy and protects local governments from being overwhelmed by the cost of litigation or coerced into capitulation by the threat of litigation. Even if an initial decision is based upon arbitrary and capricious conduct, local governments must be entitled to review that decision and correct it before they are exposed to the potentially enormous liability of a developer's claim for loss of profits because of an "inability" to develop its land.

CONCLUSION

For all the above reasons, petitioners respectfully request this Honorable Supreme Court to grant the instant petition.

Respectfully submitted,

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APPENDIX

Order of the Court of Appeals Filed July 21, 1995, Further Staying Issuance of the Certified Judgment in Lieu of Formal Mandate Until August 11, 1995 . . . . . A-1

Order of the Court of Appeals Filed July 14, 1995, Staying Issuance of the Certified Judgment in Lieu of Formal Mandate Until July 28, 1995 . . . . . A-2

Order of the Court of Appeals Filed June 21, 1995, Denying Petitions for Rehearing A-3

Order and Opinion of the Court of Appeals Filed May 26, 1995, Granting Respondent's Appeal In Part A-5

Judgment Order of the District Court Entered March 4, 1994, Entering Judgement for Petitioners A-34

Order of the Distict Court Entered March 4, 1994, Granting Petitioners' Motions Pursuant to Fed.R.C.P. 50(a) A-35

Amendment XIV, United States Constitution, Section 1 . . A-38

53 P.S. Section 4104(a) A-39

Damages Portion of Respondent's Pre-Trial Order For The Second Trial Filed Pursuant to Local Rule 21(d)(2) Of The Eastern District of Pennsylvania A-40

Transcript Of Bensalem Township Board Of Supervisors Meeting Of April 17, 1989 . . . . . A-43

Court-approved Stipulation of February 26, 1988 . . . . . A-66

Recommendation Letter of Township Engineer, Feb. 17, 1988 . . . . . A-71

Recommendation Letter of Township Engineer, Mar. 2, 1989 . . . . . A-73

Recommendation Letter of Township Engineer,
Dec. 29, 1988 . . . . . A-75

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos 94-1344 and 94-1362

BLANCHE ROAD CORP

vs.

BENSALEM TOWNSHIP et al.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby FURTHER stayed until August 11, 1995

_____
Circuit Judge

Dated: July 21 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 94-1344 and 94-1362

Blanche Road Corporation vs. Bensalem Township et al.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until July 28, 1995.

Dated: July 14, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1344 & 1362

BLANCHE ROAD CORPORATION, A PENNSYLVANIA CORPORATION, GENERAL PARTNER AND TRADING AS BLANCHE ROAD ASSOCIATES, I, A PENNSYLVANIA LIMITED PARTNERSHIP

V.

BENSALEM TOWNSHIP; DAVID GARY COSTELLO; JOSEPH FRANCANO; JOHN J. MAHER, JR.; JOSEPH RYAN; PATRICIA A. ZAJAC; JAMES NOLAN' CHARLES W. SEEBERGER; THOMAS J. WALLS; CARMEN RADDI; NANDI THAKURIA; HERBERT T. SCHEUREN, JR., INDIVIDUALLY AND D/B/A ENVIRONMENTAL ENGINEERING KINETICS INTERNATIONAL, INC. D/B/A E.E.K.I., INC. D/B/A DELAWARE VALLEY CONSULTING ENGINEERS, INC.; LILLIAN E. STEINER; DANIEL D. STAERK; WILLIAM RICHARD OETTINGER; EMIL F. TOFTEN, ESQUIRE; JAHN ROOS LANDIS, ESQUIRE

Blanche Road Corporation
Appellant in 94-1344

Bensalem Township, David Gary Costello (in his official capacity), Joseph Franco, John J. Maher, Jr. (in his official capacity), Joseph Ryan (in his official capacity), Patricia A. Zajac, James Nolan, Charles Seeberger, Thomas Walls, Carmen Raddi, Lillian E. Steiner, Daniel D. Staerk, William Richard Oettinger, Emil F. Toften, Esquire, and Jahn Roos Landis, Esquire

Appellants in 94-1362

BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, and SAROKIN, Circuit Judges

SUR PETITION FOR REHEARING IN BANC

The petitions for rehearing filed by appellees/cross appellants Bensalem Township, David Costello, John J. Maher, Jr. and Joseph Ryan in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petitions for rehearing are denied.

Dated: Jun 21, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1344 & 1362

BLANCHE ROAD CORPORATION, A PENNSYLVANIA CORPORATION, GENERAL PARTNER AND TRADING AS BLANCHE ROAD ASSOCIATES, I, A PENNSYLVANIA LIMITED PARTNERSHIP

V.

BENSALEM TOWNSHIP; DAVID GARY COSTELLO; JOSEPH FRANCANO; JOHN J. MAHER, JR.; JOSEPH RYAN; PATRICIA A. ZAJAC; JAMES NOLAN; CHARLES W. SEEBERGER; THOMAS J. WALLS; CARMEN RADDI; NANDI THAKURIA; HERBERT T. SCHEUREN, JR., INDIVIDUALLY AND D/B/A ENVIRONMENTAL ENGINEERING KINETICS INTERNATIONAL, INC. D/B/A E.E.K.I., INC. D/B/A DELAWARE VALLEY CONSULTING ENGINEERS, INC.; LILLIAN E. STEINER; DANIEL D. STAERK; WILLIAM RICHARD OETTINGER; EMIL F. TOFTEN, ESQUIRE; JAHN ROOS LANDIS, ESQUIRE

Blanche Road Corporation
Appellant in 94-1344

Bensalem Township, David Gary Costello (in his official capacity), Joseph Franco, John J. Maher, Jr. (in his official capacity), Joseph Ryan (in his official capacity), Patricia A. Zajac, James Nolan, Charles Seeberger, Thomas Walls, Carmen Raddi, Lillian E. Steiner, Daniel D. Staerk, William Richard Oettinger, Emil F. Toften, Esquire, and Jahn Roos Landis, Esquire

Appellants in 94-1362

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil Action No. 89-cv-09040

Argued December 6, 1994

Before: STAPLETON, ROTH and LEWIS
Circuit Judges

(Opinion Filed May 26, 1995)

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OPINION OF THE COURT

ROTH, Circuit Judge:

This appeal arises from a §1983 action brought by Blanche Road Associates (Blanche Road) and its general partner, Blanche Road Corporation, against Bensalem Township and several of its officials and employees. the appeal raises several issues, including whether the district court abused its discretion after the first trial by granting a new trial and whether the judge

erred by failing to recuse himself in the second trial. We conclude, however, that the dispositive issue is whether, during the second trial, the district court properly granted defendants' motion for judgment as a matter of law. Because we find that the court erred in granting this motion, we will reverse and remand this action for yet another trial.

I.

Adam and Blanche Talacki purchased a 52-acre tract of undeveloped land in Bensalem Township in 1967. A subdivision and land development plan, dividing the land into 32 lots, was approved by the Township and recorded in 1972. In addition, the Talackis and the Township entered into a one-year subdivision agreement which required the Talackis to complete certain improvements, including roads, curbs, and a drainage system, by June 28, 1973. These improvements were substantially completed.

In 1982, Bensalem Township enacted a subdivision and land development ordinance to assist orderly, efficient and integrated development of land. This ordinance was amended on June 15, 1987, with the addition of impact fees, based on the number of dwelling units or on the square footage of commercial buildings to be constructed on a developed lot. Township regulation of development and construction was expanded again on July 27, 1987, by enactment of Ordinance 371, which adopted most of the Building Officials & Code Administrators, International, Inc. ("BOCA") National Building Code. Included in this July ordinance was a Code Appeals Board to hear appeals from code violations.

In 1986, the Talackis and Walter and Margaret Czekay decided to develop an industrial park on the 23 undeveloped lots in the subdivision. They formed Blanche Road Corporation, and, with Blanche Road Corporation as the general partner and the Talackis and Czekays as limited partners, they formed Blanche Road Associates, a Pennsylvania limited partnership. Blanche Road Associates began operations by purchasing one lot

from the Talackis and entering into an option agreement with them to purchase any or all of the remaining lots over the next four years. The Talackis and Czekays planned to build on the lots sequentially, by investing the proceeds from the sale or lease of one developed lot in the development of the next lot, until the industrial park was completed. To this end, Blanche Road Installed water and sewer lines for all of the lots and resurfaced the roads, at a cost of approximately $300,000. Blanche Road also established a sales office, hired a park manager, purchased construction equipment, and began marketing the lots.

The parties' dispute centers on Blanche Road's attempts to obtain various building permits for lots in the industrial park. Plaintiffs claim that the Township, through its supervisors and employees, engaged in a campaign of harassment designed to force Blanche Road to abandon its development of the industrial park. Defendants, on the other hand, maintain that they were applying the local zoning and permitting regulations in a lawful and reasonable manner.

In Bensalem Township, during the relevant time period, an aspiring developer of a parcel of land was required first to obtain the Township's approval of the subdivision plan and then to acquire three permits. The first permit was a land alteration permit, which gave the developer the right to clear the land of existing vegetation and to alter the course of surface water. In order to qualify for this permit, a developer had to comply with the Township's Land Alteration Ordinance and to show that the work would not cause soil erosion or excessive water flow onto adjoining property. All land alteration permits were approved by the Township Board of Supervisors. Next, in order to erect a building, a developer was required to obtain a building permit by verifying that the building plans were in accord with applicable building codes. Finally, after the building was erected but before it could be occupied, a developer had to procure a use and occupancy permit, showing that the building had been constructed in accord with the approved plans and was safe for occupancy. All building permits and use and occupancy

permits were approved by the Township Licensing and Inspections Department (L & I).

In 1987, Blanche Road developed, constructed, and sold its first lot, lot 29, without incident. Blanche Road then obtained permits for, purchased, and began construction on lot 7. The two buildings constructed on the lot were leased to tenants. Blanche Road did not, however, obtain use and occupancy permits for the buildings before they were occupied. Next, Blanche Road filed applications for a land alteration permit and a building permit for lot 13. These applications were rejected in June 1987 by the Township zoning officer, building inspector, and fire marshall. At that time, Fire Marshall John Scott, who had rejected the building permit application, placed a note in Blanche Road's file, that read: "C.W. - S.2 - NO SPRINKLERS - CAN YOU GET THEM ON SOMETHING ELSE?"[1] Eventually, Blanche Road's applications for permits for lot 13 were approved, and in August 1987 Blanche Road completed its purchase of lot 13 and began construction.

In October 1987, Blanche Road filed applications for land alteration and building permits for lots 14 and 26. In November the permits for lots 14 and 26 were withheld, pending payment of "impact fees" of approximately $9,600 for lot 14 and =$16,000 for lot 26. The impact fees, imposed pursuant to the June 15, 1987, amendment to the Township's Subdivision and Land Development Ordinance, assessed commercial developers a fee of $.80 per square foot of proposed

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[1]According to plaintiffs, "C.W." stands for Cynthia Williams, the Township building inspector at the time: "S.2" was a building code classification for "low hazard" storage materials; and "No sprinklers" refers to the fact that, given the size of the building planned for lot 13, sprinklers were not required.

floor area.[2] Blanche Road protested the imposition of the impact fees, arguing that the ordinance was not applicable because the Township had approved the industrial park's subdivision and development plan prior to the ordinance's enactment. In response to Blanche Road's protest, Richard Moore, the Township's solicitor, "waived" the impact fees. Permits for lot 14 and 26 were then issued, and Blanche Road began construction on them.

In a December 1987 meeting, however, Township officials, including the director of L & I, Staerk, the Township engineer, Scheuren, and zoning officer, Steiner, told Walter Czekay that, despite Moore's determination to the contrary, Blanche Road would be required to pay impact fees on lots 14 and 26. They also informed Czekay that impact fees were owed on lot 13 and that Blanche Road would be required to establish an escrow account of $10,000 per lot to cover engineering fees. According to Czekay's trial testimony, Staerk told Czekay that, if Blanche Road failed to pay the impact fees, Staerk would take whatever action was necessary to stop construction at the industrial park.

Blanche Road refused to pay the impact fees or to establish an escrow account for the engineering fees. Later that month, on December 22, Code Enforcement Officer William Oettinger issued a stop work order on construction at the Blanche Road site. As of that date, Blanche Road was constructing on lots 13, 14, and 26. Oettinger issued the citations to Blanche Road, based upon violation of erosion and sedimentation control measures outlined in the land alteration permits. In part, these citations charged violations on lots which were still owned by the Talackis. A citation was also issued for land alteration without a permit. In issuing the stop work order, Oettinger threatened that, if work did not stop at once, he would send police to arrest all Blanche Road representatives and

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[2]Under the ordinance, impact fees were to be paid to L & I upon the issuance of a building permit.

workmen on the site. He then wished plaintiffs' representatives a "Merry Christmas."

Plaintiffs contend that there was no basis for the stop work order because it was the Township's usual practice to give a developer ten days to correct a deficiency before issuing such an order. Moreover, plaintiffs argue that the Township's building code authorized the issuance of stop work orders only with respect to "work on any building or structure...being prosecuted...contrary to the...code or in an unsafe or dangerous manner," and that no such violations were noted on the stop work citations. Finally, plaintiffs point out that the Township's Building Inspector, Cindy Williams, had been at the site approximately three days prior to the issuance of the stop work order and had not issued any citations.

Blanche Road attempted to appeal the citations and the stop work order to the Township's Zoning Hearing Board. The Township instead directed the appeal to the Code Appeals Board, created in July 1987. Because the Code Appeals Board had not in fact been formed, the Township's Board of Supervisors quickly assembled a Board to hear Blanche Road's case. On January 11, 1988, a hearing was convened with three members of the newly constituted Code Appeals Board, but the Board declined to reach the merits of Blanche Road's appeal. At a second hearing, on February 2, 1988, Blanche Road was informed that the Board would not entertain the appeal because the Board did not have jurisdiction over the matter.[3]

One month later, Scheuren returned to the Blanche Road site with an enforcement officer from the Bucks County Conservation District, the agency responsible for enforcement of Pennsylvania's Clean Streams Act. The Conservation District

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[3]Two reasons were given for the lack of jurisdiction: the stop work order was based on ordinance violations rather than on violations of the BOCA code, and the Board members were uncertain about their qualifications to serve on the Board.

officer cited Blanche Road for failing to file or to comply with a sedimentation and erosion plan. The Township solicitor recommended that Blanche Road's permits be revoked until such time as compliance with state and local law was established. On February 8, 1988, Oettinger served Blanche Road with a notice of revocation of building and land alteration permits for lots 13, 14, and 26, as well as with a second stop work order.[4]

On February 28, 1988, Blanche Road filed a state court equity action seeking to enjoin revocation of its permits. Pursuant to a stipulation agreed to by the parties and approved by the court, the permit revocations were rescinded. In June and July 1988, Blanche Road applied for use and occupancy permits for lots 13, 14, and 26; as earlier had been the case with the permit for lot 7, the application was altered to require an additional inspection and approval by engineer Scheuren.

When Blanche Road filed applications for land alteration permits for lots 12, 21, 11, 15, and 8, the Township treated them as subdivision and land development permit applications. This treatment is significant because subdivision and land development applications require a more extensive review and are more time-consuming and costly than applications for land alteration permits. Building permits for lots 12, 21, 15, and 8 were eventually issued as "conditional" permits, containing a

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[4]The permit revocation notice and second stop work order cited additional violations, including failure to comply with certain regulations promulgated under the Pennsylvania Clean Streams Act and failure to obtain a Use and Occupancy permit for lot 7, which was occupied.

Oettinger also filed a criminal complaint against Czekay personally for occupying a building on lot 7 without a use and occupancy permit; the complaint, however, was filed in the wrong district and was ultimately withdrawn.

notation that the Township was not surrendering its right to collect impact fees on the lots.[5]

Finally, and perhaps most significantly, Blanche Road cites the testimony of Township Engineer Scheuren as evidence that the Township and its officials conspired to delay and ultimately to shut down Blanche Road's development of the industrial park. Scheuren testified that all three Supervisor defendants (Ryan, Costello, and Maher) told him to review Blanche Road's permit applications with extra scrutiny in order to "slow down" the development. According to Scheuren, Maher told him to prepare a "punch list" for lot 7 by looking for every possible violation and to proceed with whatever soil erosion violations he could find at the site in order to continue the stop work orders.

Plaintiffs allege that, due to the Township's insistence on the payment of inapplicable impact fees and to the Township's improper refusal to release and issue permits, the Talackis and the Czekays decided not to finish the project. Blanche Road was closed down.

II.

On December 20, 1989, plaintiffs brought the instant action under 42 U.S.C. §1983, alleging violations of their equal protection and due process rights in connection with the development of selected lots in the industrial park.[6] In addition

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[5]Blanche Road contends that, because no one had ever encountered "conditional" permits before, the permits created problems with Blanche Road's bank and caused a potential buyer of lot 21 to back out of its deal.

[6]Blanche Road's equal protection and procedural due process claims were dismissed during the first trial, and Blanche Road has not pursued those claims. Accordingly, the only claim presented to the jury at the first trial and raised in the second

to the Township, several officials and employees of the Township were named as defendants, including: the five Supervisors in office at the time the suit was filed (Costello, Francano, Maher, Ryan, and Zajac), the members of the Township Code Appeals Board (Nolan, Seeberger, and Walls), Township Manager Raddi, Zoning Officer Steiner, Director of the Department of Licenses and Inspections (L & I) Staerk. Code Enforcement Officer Oettinger, Township Engineers Scheuren and Thakuria, and Solicitor Toften and his associate Landis.

Blanche Road sought four types of damages from these defendants: (1) damages resulting from the Township's delay in issuing permits for lots 7, 8, 10, 12, 13, 14, 15, 25, and 26; (2) overhead costs and legal fees; (3) lost opportunity costs on lots 11 and 21, which Blanche Road unsuccessfully attempted to develop; and (4) lost profits which would have been earned from the remaining lots in the subdivision if Blanche Road had the opportunity to purchase or develop them.

During the first trial, the district court held as a matter of law that Blanche Road could not recover damages in connection with the lots which it never purchased and for which it had never applied for permits. The court based this ruling on its conclusion that, in addition to being speculative, any damages arising from the non-optioned lots could not causally be linked to defendants since defendants had never had the opportunity to act on any permits in connection with the lots. In accordance with the court's ruling, Blanche Road was precluded from submitting evidence of any damages suffered in connection with the non-optioned lots.

At the close of plaintiffs' case in the first trial, the district court granted judgment as a matter of law in favor of defendants Staerk, Toften, Francano, Zajac, and Raddi, on the

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trial is a violation of substantive due process.

basis of insufficient evidence.[7] Therefore, due to the earlier dismissal of several other defendants from the case,[8] Blanche Road's substantive due process claims proceeded to trial against the following defendants: the Township; Supervisors Costello, Ryan, and Maher; Township Engineers Scheuren and Thakuria; and Code Enforcement Officer Oettinger.

At the end of the first trial, the jury returned a verdict for plaintiffs, with special interrogatories finding that (1) Blanche Road's substantive due process rights had been violated, (2) the remaining defendants were responsible for this violation, and (3) defendants Costello, Ryan, and Maher had participated in a conspiracy to violate Blanche Road's rights. The jury also found that Blanche Road was entitled to total compensatory damages of $2 million, of which defendants Costello, Ryan, and Maher were liable for $500,000 each, and defendants Scheuren, Thakuria, and Oettinger were liable for $165,000 each.[9] At the time of the individual compensatory damages award fell short of the total compensatory damages award of 2$ million and also that the jury had not specified the amount of damages for which the Township was liable. The court offered to ask the jury an additional question regarding the Township's liability, but counsel for both sides agreed that the court should simply make an appropriate finding based upon the verdict. The district

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[7]Blanche Road appeals this ruling only insofar as it applies to Staerk.

[8]Defendants Steiner and Landis were previously dismissed by stipulation. In addition, the claims against defendants Walls, Seeberger, and Nolan (members of the Code Appeals Board) were dismissed on summary judgment. Blanche Road does not appeal as to any of these defendants.

[9]The jury also found that the individual defendants were liable for punitive damages in the following amounts: Costello, Ryan, and Maher were liable for $2.00 each; Scheuren, Thakuria, and Oettinger were liable for $1.00 each.

court then awarded damages against the Township in the amount of $1,500,000, representing the compensatory damages awards against the three Supervisor defendants. The court explained that it did not hold the Township liable for the damages assessed against Oettinger, Scheuren, and Thakuria because the jury had found that those defendants did not conspire with the Supervisors to violate Blanche Road's rights.

Following the trial and the verdict, the Township, the Supervisor defendants, and Oettinger all moved for judgment as a matter of law under Rule 50, Fed.R.Civ.P., or for a new trial.[10] The district court denied the Township and the Supervisor defendants' motions, holding that there was sufficient evidence to support the jury verdicts against them. The court granted these defendants' motion for a new trial, however, on the basis that plaintiffs' counsel had "pursued a pattern of misconduct from opening statement through final argument" that led to the introduction of inadmissible and prejudicial information before the jury. The court found that there was a "reasonable probability that the jury's findings were influenced by Plaintiffs' counsel's highly improper conduct, to the unfair prejudice of the moving Defendants." Blanche Road Corp. v. Bensalem Township, No. 89-9040, mem. order at 2 (Aug. 26, 1993). The district court also granted Oettinger's motion for judgment as a matter of law, finding that the evidence did not show that he had acted with an improper motive or bad faith. Id. In the event that judgment for Oettinger was reversed on appeal, the district court granted him a new trial for the same reason it had granted a new trial for the Township and the Supervisor defendants. Id.

During the second trial, plaintiffs moved for recusal of the district court judge, who had presided over the case from the beginning. Blanche Road's motion was based upon the district

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[10]Defendants Scheuren and Thakuria have not challenged the judgments against them and are not part of the instant appeal.

judge's manner in questioning some of plaintiffs' witnesses. The judge denied the motion, and the trial continued.

At the close of plaintiffs' case in the second trial, the district court granted the remaining defendants' motions for judgment as a matter of law under Rule 50(a), Fed.R.Civ.P., and dismissed the case by final order entered on March 2, 1994.

III.

The district court had jurisdiction over this matter pursuant to 28 U.S.C. §§1331 and 1343, This Court has jurisdiction pursuant to 28 U.S.C. §1291, as the instant appeal and cross-appeal follow from a final judgment entered by the United States District Court for the Eastern District of Pennsylvania.

IV.

In this appeal, plaintiffs challenge several decisions made by the district court over the course of both trials.[11] Specifically, in connection with the first trial, plaintiffs challenge: (1) the district court's grant of defendants Staerk and Oettinger's Rule 50 motions, (2) the district court's grant of a new trial, (3) the district court's decision barring plaintiffs from presenting damages evidence pertaining to the subdivision lots that plaintiffs never attempted to purchase, and (4) the district court's molding of the verdict in response to the jury's answers to special interrogatories. Plaintiffs also challenge the district court's decisions in the second trial to deny plaintiffs' motion for recusal and to dismiss plaintiffs' claims against the remaining defendants.

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[11]Defendants also raise issues pertaining to both trials on cross-appeal. To the extent that these issues are not dealt with by our remand of this case for a new trial, we resolve them in Section VI.B., supra. [sic]

V.

A.

Turning our attention to the issues arising from the first trial, we find that the district court did not err in granting the Rule 50 motions on behalf of Staerk and Oettinger. A Rule 50(a) directed verdict may be granted if, construing all the evidence presented in the light most favorable to the party opposing the motion, the court finds as a matter of law that no jury could decide in favor of the nonmoving party. In reviewing the district court's grant of the Rule 50 motions, we exercise plenary review. See Indian Coffee Corporation v. Proctor & Gamble, Co., 752 F.2d 891, 894 (3d Cir. 1985).

At the close of plaintiffs' case, the only evidence which had involved Staerk was testimony that Staerk directed Walter Czekay to pay the impact fees and that he threatened to shut down the development if the fees were not paid. This evidence was insufficient to support a finding that Staerk violated plaintiffs' civil rights. In order to demonstrate that Staerk, as a government agent, violated plaintiffs' civil rights, plaintiffs would have had to show either that (1) Staerk's actions were not rationally related to a legitimate government interest; or (2) that Staerk's actions were "in fact motivated by bias, bad faith or improper motive."Parkway Garage v. Philadelphia, 5 F.3d 685, 692 (3d Cir, 1993) (citing Midnight Sessions, Ltd. v. Philadelphia, 945 F.2d 667, 683 (3d Cir. 1991), cert. denied, 112 S. Ct. 1668 (1992)). Clearly, Staerk's demand that plaintiffs pay impact fees required by a county ordinance is rationally related to a legitimate government interest. Plaintiffs, therefore, were required to demonstrate that Staerk's actions were motivated by bias, bad faith or improper motive. Had plaintiffs presented additional evidence indicating that Staerk attempted to collect the impact fees for an improper reason, their civil rights claim against Staerk could have survived a motion for judgment as a matter of law. Because plaintiffs failed to present any such evidence, however, the district court

did not err in granting judgment in favor of defendants on plaintiffs, claims against Staerk.

Plaintiffs' argument that Staerk should be liable under a theory of supervisor liability also fails. It is well settled that the doctrine of respondent superior may not be employed to impose § 1983 liability on a supervisor for the conduct of a subordinate which violates a citizen's constitutional rights. Monell v. Dept. of Social Services, 436 U.S. 658, 691 (1978). Instead, in order to establish Staerk's liability for the actions of Oettinger, his subordinate, plaintiffs were required to produce evidence first that Oettinger's conduct violated plaintiff's constitutional rights and second that Staerk knew of Oettinger's conduct and approved it. See St. Louis v. Praprotnik, 485 U.S. 112 (1988); Kernats v. O'Sullivan, 35 F. 3d 1171, 1182 (7th Cir, 1994). Because plaintiffs satisfied neither requirement, the district court properly granted Staerk's Rule 50 motion.

Furthermore, we conclude that the district court properly granted judgment as a matter of law on plaintiffs' claims against Oettinger. This ruling followed the jury's verdict, which found that Oettinger was not involved in the conspiracy to violate plaintiffs' constitutional rights. The district court reasoned that, without the actions of the co-conspirators being charged to him, insufficient evidence existed to establish bad faith or improper motive on the part of Oettinger. Citing Winn v. Lynn, 941 F.2d 235 (3d Cir. 1991), the district court held that Oettinger fell into the category of government officials performing discretionary functions whose conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known." Id. at 239.

Plaintiffs take issue with this conclusion arguing that Oettinger did manifest bad faith by wishing Czekay and others a "Merry Christmas," after issuing the first stop work order, and by filing a criminal complaint against Czekay for occupying a

building on lot 7 without an occupancy permit.[12] Neither of these actions, however, unpleasant as they may be, rise to the level of bad faith required to support a § 1983 violation. Nor, in view of the jury finding that Oettinger was not a part of the conspiracy, can these actions be considered to have been taken by Oettinger as a part of the overall conspiracy. Moreover, it is undisputed that erosion and sedimentation control violations did exist in the industrial park area when the stop work orders were issued. Plaintiffs in essence failed to prove that Oettinger had the motivation or bad faith required if there is to be a finding that he committed a substantive due process violation. See Parkway Garage, 5 F.3d at 692. Accordingly, the case against Oettinger was properly dismissed by the district court.

B.

The next question arising from the first trial is whether the district court properly granted defendants' motion for a new trial. As noted in Olefins Trading v. Han Yang Chem Corp., 9 F.3d 282, 290 (3d Cir. 1993), this Court applies a deferential "abuse of discretion" standard when reviewing a trial court's grant of a new trial motion. Specifically, in cases involving counsel misconduct, we defer to the trial court's assessment of the level of prejudice involved "because the trial judge was present and able to judge the impact of counsel's remarks." Fineman v. Armstrong World Indus., 980 F.2d 171, 207 (3d Cir. 1992).

In its Memorandum Order of August 24, 1993, the district court, after expressly stating that the jury's verdict was supported by the weight of the evidence when viewed in the light most favorable to plaintiffs, granted defendants' motion for

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[12] Czekay was not in fact an occupant of the lot 7 building. The building was, however, being occupied without a permit. As we note infra in foot note 4, this complaint against Czekay was ultimately withdrawn.

a new trial on the ground of counsel misconduct. The Court reasoned:

> [T]he record reveals that counsel for Plaintiffs pursued a pattern of misconduct from opening statement through final agreement. Unfortunately, Plaintiffs' counsel was able to get before the jury information that was inadmissible as evidence and clearly unfairly prejudicial to moving defendants. Counsel's pattern of conduct is probative of his belief that such misconduct was necessary to the success of Plaintiff's case. I am convinced beyond any doubt that there is a reasonable probability that the jury's findings were influenced by Plaintiff's counsel's highly improper conduct, to the unfair prejudice of the moving Defendants. Moreover, cautionary instructions could not and did not cure the unfair prejudice. I must grant a new trial not as punishment to Plaintiffs' counsel, but to assure fairness and due process to moving defendants.

Blanche Road Corp. v. Bensalem Township, No. 89-9040, slip op. at 2 (E.D.Pa. Aug. 24, 1993) (footnote omitted). Thus, the district court's decision to grant defendants a new trial was based upon the court's determination that plaintiff's counsel had engaged in misconduct that had in all probability influenced the jury.

In this circuit, the test for determining whether to grant a new trial in cases involving counsel misconduct is "whether the improper assertions have made it 'reasonably probable' that the verdict was influenced by prejudicial statements." Greate Bay Hotel & Casino v. Tose, 34 F.3d 1227, 1236 (3d Cir. 1994) (citing Fineman v. Armstrong World Indus. 980 F.2d 171, 207 (3d Cir. 1992)). In the instant case, it is clear that the district court did not abuse its discretion by finding that this standard was met; the record is replete with examples of counsel misconduct that might have influenced the jury. For example, counsel repeatedly argued with the court regarding its rulings, see e.g., Joint Appendix (J.A.) 212, 251, 868, even going so far

as to inform the court, in the presence of the jury, that it was not treating counsel or his client fairly. J.A. 373, 869. Counsel also commented before the jury, based on the cross-examination of his witness, Walter Czekay, that Czekay had "answered honestly, candidly, accurately. His testimony is excellent." J.A. 0183. In addition, counsel in his closing argument referred to backdated documents, for which no evidence existed in the record; he argued that Costello, Ryan, and Maher had told the Scheuren "to backdate some documents and then they watch him go to jail." J.A. 3051. This short list is representative of the type of counsel misconduct that permeated the first trial. The district court's decision to grant a new trial on this basis was not an abuse of discretion.

C.

The next issue raised in connection with the first trial is the district court's decision to mold the verdict to conform with the jury's responses to special interrogatories. This issue is rendered moot, however, in light of our decision to affirm the district court's grant of the second trial.

D.

Finally, plaintiffs contend that the district court erred in holding as a matter of law during the first trial that Blanche Road could no recover damages in connection with the lots it had never purchased and for which it had never applied permits. The court based its ruling on its conclusion that, in addition to being speculative, any damages arising from the non-optioned lots could not be causally linked to defendants since defendants never had the opportunity to act on any permits in connection with the lots. (J.A. 812-14).

Section 1983 "creates 'a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution.'" Memphis Community School District v. Stachura, 477 U.S. 299, 302-06 (1986) (quoting from Carey v. Piphus, 435 U.S. 247, 253 (1978)

(internal quotation and citation omitted)). Damages in § 1983 "cases are designed to provide 'compensation for the injury caused plaintiff by defendant's breach of duty.'" Id. at 306 quoting from 2 F. Harper, F. James, and O. Gray, Law of Torts §25.1 (2d ed. 1986)). "To that end, compensatory damages may include [both] out of pocket loss and other monetary harms," as well as more intangible injuries, resulting from the breach. Id. at 307.

"The level of damages [in a § 1983 case] is ordinarily determined according to principles derived from the common law of torts." id. at 306 (emphasis supplied). That common law is reflected in the law of Pennsylvania. Under Pennsylvania law, speculative damages may not be awarded Damages are considered speculative if "the uncertainty concerns the fact of damages, not the amount." See Carroll v. Philadelphia Housing Authority 650 A.2d 1097 (Pa Cmwlth. 1994). Consequently, damages are not considered speculative merely because they are not capable of exact calculation. See Ashcraft v. C. G. Hussey & Co., 359 Pa. 129, 58 A.2d 170 (1948). Rather, Pennsylvania law merely requires that plaintiffs present a reasonable quantity of information from which a jury can fairly estimate the damages Id.

In the instant case, plaintiffs met this burden. Plaintiffs established that, as of 1986, plaintiffs had an option to purchase and develop 23 lots in Blanche Road subdivision. In reliance on this option, plaintiffs invested $300,000.00 in road improvements and water and sewer lines which benefited the whole industrial park. Furthermore, plaintiffs showed that, two years later, they abandoned their attempt to develop an industrial park. They contend that the premature termination of the project was caused by defendants deliberate interference and delay.

The district court dismissed the claim on ripeness grounds: the options to purchase had not been exercised and no permits had been sought for these lots. As we will discuss more fully below in Section VI.B., under plaintiffs' theory that

defendants' deliberate delay caused their loss, plaintiffs need not wait for the exercise of the options or the completion of the permitting process before bringing suit. We conclude that the district court erred in precluding plaintiffs from pursuing their claim for recovery of damages resulting from their alleged inability to develop lots that they never purchased. Nevertheless, plaintiffs will still bear the burden of proving causation and of offering sufficient evidence of loss to demonstrate that these damages can reasonably be calculated and consequently are not unduly speculative.

VI.

In reviewing a judge's decision not to recuse himself, our standard of review is abuse of discretion. See Edelstein v. Wilentz, 812 F. 2d. 128, 131 (3d Cir. 1987).

Plaintiffs' argument for recusal in this case focuses on the district judge's comments, both before the jury and at side bar, indicating his distrust toward and frustration with plaintiffs and plaintiff's counsel. These comments include the court's suggestion that plaintiffs' counsel had somehow "maneuvered" to ensure Scheuren's appearance as a witness, J.A. 4217, and the court's declaration that plaintiffs' counsel conducted the worst direct examination the court had ever seen. J.A. 273. The district judge was also skeptical of plaintiffs' witnesses as reflected in his extensive questioning of them and his comment during argument on the motion to rescue that Czekay "doesn't have any right to say things which are not true initially and hope that it doesn't get clarified either by cross-examination or the Court." J.A. 4455.

Under 28 U.S.C. § 455(a), recusal is required whenever a judge's impartiality "might reasonably be questioned." Accordingly, a judge should recuse himself where "a reasonable man knowing all the circumstances would harbor doubts concerning the judge's impartiality." United States v. Dalfonso, 707 F.2d 757, 760 (3d Cir. 1983); see also Alexander v. Primerica Holdings, 10 F. 3d 155 (3d Cir. 1993) (ordering the

reassignment of a case because the judge's impartiality could reasonably be questioned).

We recently interpreted the standard of "impartiality" required under 28 U.S.C. § 455(a) In United States v. Bertoli, 40 F.3d 1384 (3d Cir. 1994). Citing Liteky v. United States, 114 S> Ct. 1147 (1994), we stated that the "extrajudicial source" doctrine, arising under 28 U.S.C. § 455(b)(1)[13] also applies to § 455(a). Under the "extrajudicial source" doctrine, "bias, in order to form the basis for recusal, must stem from a source outside of the office proceedings." Bertoli, 40 F.3d at 1412. Consequently, because the source of bias must be an external source, "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties or their cases, ordinarily do not support a bias or partiality challenge." Id. (citing Liteky, 114 S. Ct. at 1157)>

Despite this external source requirement, recusal may still be required if the judge's actions during the trial, considered objectively, "display a deep-seated favoritism or antagonism that would make fair judgment impossible." Bertoli, 40 F.3d at 1412; see also United States v. Antar, Nos. 94-5228 and 94-5230, slip op. at 7-20 (3d Cir. Apr. 12, 1995) (requiring recusal after the judge explicitly revealed having an improper goal in the proceeding). After reviewing the record in this case, however, we do not find that the district judge's actions demonstrated the type of bias warranting his recusal from the case. Although it is true that at times the judge criticized plaintiffs for attempting to mislead the jury and became short-tempered with plaintiffs' counsel, these comments appear to arise from the judge's impatience and frustration with the manner in which plaintiffs were trying their case, rather than any partiality for defendants. As Justice Scalia wrote in Liteky:

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[13] Section 28 U.S.C. § 455(b)(1) requires disqualification when the judge "has a personal bias or prejudice concerning the party."

> Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration-even a stern and short-tempered judge's ordinary efforts at courtroom administration-remain immune.

114 S.Ct. at 1157. Accordingly because the district judge's actions and comments did not manifest a deep-seated bias that would render fair judgment impossible, we find that he did not abuse his discretion in not rescuing himself from the second trial.

B.

The second issue from the second trial is the district court's granting of judgment as a matter of law to defendants after the completion of the plaintiffs' case. A Rule 50(a) directed verdict may be granted only if, as a matter of law, viewing all the evidence which has been tendered and should have been admitted in the light meet favorable to the party opposing the motion, no jury could decide in that party's favor. Our review of the grant of such a motion, no jury could decide in that party's favor. Our review of the grant of such a motion is plenary. see indian Coffee Corp. v. Proctor & Gamble Co., 752 F.2d 891, 894 (3d Cir. 1985).

In granting defendants' Rule 50(a) motion, the district court made the following conclusions of law:

> [T]here are certain things which are absolutely undisputed on record. That is, that Blanche Road did, in fact apply for a number of permits....except for one,...Blanche Road had approval of the permits and proceeded to build

pursuant to the permits on all except lots 21 and 11.

...

As was noted by Judge Scirica in Acierno, the property owner has a high burden of proving that a final decision has been reached by the agency before it may seek compensatory or injunctive relief in federal court on federal constitutional grounds. No such showing of such final decision has been made in regard to those lots...on which Blanche Road did not exercise its option to become owner, upon which Blanche Road never applied for a permit; and therefore, obviously there's no ripeness as to those. ...

As to the lots for which Blanche Road applied for permits, they would fall within a separate category. As to those, I read the cases, including Acierno, as limiting substantive due process violations to mature constitutional claims, which conclusively bar the use of the property.

There is no such conclusive bar here as to any of the properties. And, in fact, they had been utilized with the exception of lots 21 and 11, which apparently have not as yet been constructed.

....

As to lot 11, plaintiff has offered into evidence ... a notice of rejection of application for permit.

...While there is this evidence of a rejection, the record is devoid of any attempt ... to appeal that to the zoning board for final determination.

I read the zoning regulations as giving jurisdiction to the zoning hearing board in such cases, and, therefore, I find ... that the controversy over lot 11 has not developed into a mature constitutional claim, and must dismiss it because of ripeness.

(J.A. 5217-5222).

Thus, in granting defendants' Rule 50(a) motion, the court applied the standards applicable in zoning cases, such as Acierno v. Mitchell, 6 F.3d 970 (3d Cir. 1993), to the instant case. For the reasons that follow, however, the ripeness requirement arising in zoning dispute cases does not apply to Blanche Road's claims and, consequently, defendants' Rule 50(a) motion should not have been granted.

In Acierno, the plaintiff challenged the county's denial of his application for a building permit. We held that the plaintiff's claim was unripe because, although his application had been rejected by the county's Development and Licensing Division, he had failed to appeal the decision to the county's Board of Adjustment, which had final authority to interpret the zoning regulations. Accordingly, plaintiff did not have a "final decision" from the county until the board of Adjustment rendered its decision on his permit application. See also Midnight Sessions, Ltd. v. Philadelphia, 945 F.2d 667, 686 [3d Cir. 1991) ("This failure to appeal precludes 'final administrative action' by the City and, therefore, these claims were premature...").

In the instant case, however, plaintiffs' claims are not dependent on a final decision from the county, since plaintiffs are not appealing from an adverse decision on a permit application.[14] Rather, plaintiffs are asserting that defendants, acting in their capacity as officers of the Township, deliberately and improperly interfered with the process by which the

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[14]In fact, virtually all of plaintiffs' permit applications were ultimately approved.

Township issued permits, in order to block or to delay the issuance of plaintiffs' permits, and that defendants did so for reasons unrelated to the merits of the application for the permits. Such actions, if proven, are sufficient to establish a substantive due process violation, actionable under §1983, even if the ultimate outcome of plaintiffs' permit applications was favorable.[15] See Bello v. Walker, 840 F.2d 1124, 1128-30 (3d Cir. 1988) (factfinder could conclude that council members, acting in their official capacity, improperly interfered with building permit process for partisan political or personal reasons unrelated to the merits of the permit applications). This is a substantively different type of claim than that presented in the ripeness cases, and internal review of the individual permit decisions is thus unnecessary to render such a claim ripe.

The district court also erred in ruling that plaintiffs' use of their property had to be "conclusively barred" in order for plaintiffs to state a claim. We have previously held that, in order to prevail on a takings claim, a plaintiff must establish that its intended use of its property was "conclusively barred" by the disputed land use regulation. See Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023, 1029 (3d Cir.), cert denied, 482 U.S. 906 (1987). In the instant case, however, plaintiffs are not claiming that their property was unconstitutionally taken for a governmental purpose without just compensation. Rather, plaintiffs claim that defendants acted deliberately and under color of state law to deprive them of their property rights by interfering in and delaying the issuance of permits. Accordingly, the district court, by relying on the ripeness standard set forth in Acierno and the "conclusively barred" standard set forth in Pace Resources, applied the wrong legal standard in granting defendants' Rule 50(a) motion.

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[15]For this reason, we reject defendants' argument that Blanche Road failed to assert a constitutional claim because it had no vested property right that could be subject to a due process violation. Plaintiffs had the right to be free from harassment in their land development efforts.

The question remains, however, whether defendants' Rule 50(a) motion should be granted if the proper legal standard were applied. Defendants posit two arguments to support their contention that, viewing all the evidence in the light most favorable to plaintiffs, no jury could find in plaintiffs' favor. First, defendants argue that, under Pennsylvania's "deemed approval" statute, 53 Pa. C.S.A. §4104, plaintiffs cannot establish damages arising from any delays in the issuance of their permits. Under the statute, if a municipality does not approve or reject a permit application within 90 days, the application is deemed approved. Plaintiffs either were granted permits within the 90 day period or they did not take legal steps to force the issuance of the permit after the expiration of the 90 days. The "deemed approved" statute, however, does not foreclose damages based upon intentional delays in the issuance of permits. One need only consider a hypothetical situation in which officials, seeking to sabotage a developer's project. Intentionally withheld each permit for 89 days or for an even longer period until the applicant would take legal steps. Such deliberate and arbitrary delays could cause significant additional expense to the developer.

Next, the Supervisor defendants contend that their Rule 50(a) motion should be upheld on the alternative ground that they were entitled to qualified immunity. Comparing the instant case to Acierno v. Cloutier, 40 F.3d 597 (3d Cir. 1994) ("Acierno II"), the supervisor defendants assert that, because Pennsylvania law is unclear as to whether a landowner's subdivision approval renders him immune from subsequent zoning amendments, the Supervisors should be entitled to immunity for their decision to treat plaintiffs' land alteration permit applications as land development permit applications and for their decision to assess the impact tax on the property. Furthermore, the Supervisor defendants assert that they are entitled to qualified immunity for any personal involvement they might have had in the stop work orders and permit revocations issued for lots 13, 14 and 26, because there was a perceived threat to public health, safety, and welfare.

The test for determining whether government officials are entitled to qualified immunity for their actions, as set forth in Harlow v. Fitzgerald, 457 U.S. 800 (1982), is that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818. In the instant case, however, when the evidence is viewed in the light most favorable to plaintiffs, it is clear that defendants could not have reasonably believed that their conduct did not violate defendants' rights. If defendants, for reasons unrelated to an appropriate governmental purpose, intentionally conspired to impede the development of the Blanche Road project, by ordering that Blanche Road's applications be reviewed with greater scrutiny in order to slow down the development and by ordering that efforts be taken to shut down the development, such an arbitrary abuse of governmental power would clearly exceed the scope of qualified immunity. Accordingly, the defense of qualified immunity is not available to defendants in the instant matter.[16]

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[16]The Township has cross-appealed on the ground that there was insufficient evidence from which a jury could find a Township policy based upon a custom of tolerating or sanctioning conduct that violated plaintiffs' rights. Our review, however, convinces us that the plaintiffs' evidence was sufficient for a jury to conclude that Township Supervisors Costello, Ryan, and Maher all conspired to shut down the Blanche Road development.

Under §1983, "a plaintiff must show that an official" who has the power to make policy is responsible for either the affirmative proclamation of a policy or acquiescence in a well-settled custom." Bielevicz v. Dubinon, 915 F.2d 845, 850 (3d Cir. 1990) (citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990)). In determining whether an official holds such policymaking authority, courts are to consider whether an official has "final, unreviewable discretion to make a

VII.

For the above stated reasons, we will vacate the district court's order, granting defendants' Rule 50(a) motion, and we will order a new trial in this matter. On retrial, the plaintiffs may present evidence of loss suffered from their inability to develop the lots, which they did not purchase and for which no permits were sought, if they can establish a causal link between such loss and the defendants' actions and if they can present a basis, which is not unduly speculative, for calculating such loss.

A True Copy:
Teste:

Clerk of the United States Court of
Appeals for the Third Circuit

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decision or take an action." Andrews, 895 F.2d at 1481. In the instant case, the Supervisor defendants had clear authority to execute final, nonreviewable actions, as evidenced by their control over the licensing process in the Township. Accordingly, plaintiffs' evidence, if believed, is sufficient to establish Township liability under §1983.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BLANCHE ROAD CORP.	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 89-9040
	:	
BENSALEM TOWNSHIP,	:	
et al.	:	
Defendants:		

JUDGMENT

AND NOW, this 2nd day of March, 1994, IT IS HEREBY ORDERED that JUDGMENT IS ENTERED in favor of Defendants David Gary Costello, John J. Maher, Jr., Joseph Ryan, and Bensalem Township and against Plaintiff Blanche Road Corporation on all claims based on lots for which permit applications were filed and permits approved.

IT IS FURTHER ORDERED that all other claims are DISMISSED without prejudice.

BY THE COURT

_____
CLIFFORD SCOTT GREEN, S.J.

Entered 3/4/94

Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BLANCHE ROAD CORP. Plaintiff,	:	CIVIL ACTION
v.	:	NO. 89-9040
BENSALEM TOWNSHIP, et al. Defendants	:	

ORDER

Presently before this Court are the Rule 50 motions for judgment as a matter of law of Defendants David Gary Costello, John J. Maher, Jr., Joseph Ryan, and Bensalem Township. Also before this Court are Plaintiff's responses thereto.

AND NOW, this 28th day of February, 1994, upon consideration of Defendants' Rule 50 motions, Plaintiff's responses thereto, the trial record, and oral argument and for the reasons stated this day of record, IT IS HEREBY ORDERED that:

1. JUDGMENT be entered in favor of Defendants and against Plaintiff as to those claims based on lots for which permit applications were filed and permits approved;

2. As to the building permit application for lot 11 which application was filed by Plaintiff and rejected by William Oettinger, Building Inspector of the Defendant

Township, Plaintiff's claims are DISMISSED without prejudice as unripe[1];

3. As to lots 13, 14, and 26 for which stop work orders were issued and building permits were revoked by Building Inspector Oettinger and thereafter reinstated pursuant to stipulation of the parties as approved by the Court of Common Pleas of Bucks County, Plaintiff's claims are DISMISSED without prejudice as unripe[2];

4. As to lots for which no permit application was ever filed with the Defendant Township, Plaintiff's claims are

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[1]At oral argument, Plaintiff relied upon Plaintiff's exhibit 203 to show the rejection of this permit. To the extent that Plaintiff alternatively relies on a subsequent approval of this permit after the earlier rejection accompanied by a failure of the appropriate agency of the Defendant Township to issue this permit, Plaintiff's claims are also DISMISSED without prejudice as unripe based on Plaintiff's failure to exhaust further administrative remedies to obtain the issuance of this permit.

[2]It appears that the construction on each of these lots has been completed pursuant to the stipulation and order of the Bucks County Court of Common Pleas. Accordingly, there would be no final denial by the Defendants of permit rights to Plaintiff and arguably Defendants are entitled to judgment as to these claims. However, the evidence, when viewed in the light most favorable to Plaintiff, supports Plaintiff's contention that the Bucks County litigation is still pending and thus no final administrative or court decision has been rendered so as to make these claims ripe for adjudication before this Court.

DISMISSED without prejudice as unripe.

BY THE COURT

_____

CLIFFORD SCOTT GREEN, S.J.

Entered 3/4/94

Clerk of Court

AMENDMENT XIV, UNITED STATES CONSTITUTION

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pennsylvania Statues
53 §4104(a)

§4104. Building permits; time for approval; explanation for disapproval; highway occupancy permits; "buildings, structures or devices" defined

(a) A municipality which regulates the construction, erection, maintenance, operation or repair of buildings, structures or devices by means of an ordinance requiring the filing of an application, the payment of a fee and the issuance of a permit shall render a decision either approving or disapproving the application for a permit within 90 days after the application is filed unless the ordinance requires a decision within a lesser period of time, provided that any disapproval of the application shall be issued within said 90-day period containing a brief explanation setting forth the reasons for said disapproval and the manner in which the application can be corrected and/or modified to obtain the required approval. If no decision is rendered on the application within 90 days, the application shall be deemed to be approved and the permit shall be deemed to have been granted immediately, unless the applicant has agreed in writing to an extension of time. No agreement to extension of time for action may be made a part of an application form nor may any such agreement be required of any applicant under threat of denial of the application.

3. Delay damages

As a result of the December 1987 - February 1988 construction shutdown, Blanche Road incurred delay damages with respect to lots 13, 14 and 26 as follows:

Lot 13	$39,600
Lot 14	$34,419
Lot 26	$61,000

As a result of delays in securing permits which were caused by the Township's treatment of Blanche Road's land alteration applications as land development and other delay tactics, Blanche Road incurred constructio and rental delay damages with respect to lots 7, 8, 10, 12, 15 and 25 as follows:

Lot 7	$ 7,991
Lot 8	$96,136
Lot 10	$ 8,365
Lot 12	$15,705
Lot 15	$15,774
Lot 15	$14,334

Plaintiff also incurred costs of overhead and legal fees as a result of defendants' wrongful conduct. These damages are:

Equipment payments	$ 9,165.00
Payroll	$39,939.57
Benefits	$ 3,184.47
Telephone	$ 896.20
Rent	$ 6,794.56
Insurance	$ 3,498.68
Legal	$39,855.81
Auto expenses	$ 6,787.40
Interest on lots	$22,166.69
Real estate taxes on lots	$19,833.31
Total	$152,121.69

The total amount of all delay damages is $445,446 in 1987-89 dollars. Adjusted to present day dollars (six percent per year for five years), plaintiff claims total delay damages of $596.107.

4. Lost opportunity damages

Plaintiff will present two alternative measures of lost opportunity damages. First, plaintiff seeks lost opportunity damages for all thirteen undeveloped lots as follows:

BUILDINGS THAT WOULD HAVE BEEN SOLD (in 1994 dollars)

Lot 20 (1989)	$1,063,869
Lot 21 (1989)	$1,032,856
Lot 6 (1989)	$ 336,681
Lot 22 (1990)	$ 396,301
Lot 24 (1990)	$ 318,266
Lot 16 (1991)	$ 307,962
Total Sales Profits	$3,455,935

BUILDINGS THAT WOULD HAVE BEEN RENTED AND SUBSEQUENTLY SOLD (in 1994 dollars)

Lot 11 (1989-94)	$ 568,596
Lot 17 (1989-94)	$ 482,405
Lot 18 (1990-95)	$ 448,747
Lot 27 (1990-95)	$ 675,539
Lot 19 (1991-96)	$ 408,210
Lot 23 (1991-96)	$ 508,033
Lot 34 (1991-96)	$1,561,802
Total Rentl Profits	$4,653,332

TOTAL LOST OPPORTUNITY DAMAGES	$8,109,267

Second, should the Court rule again that plaintiff is precluded from recovering damages for all undeveloped lots

other than lots 11 and 21, plaintiff's damages, in 1994 dollars, are as follows:

Lot 21 (Sold 1989)	$1,032,856
Lot 11 (Rented 1989 and sold 1994) then sold)	$ 568,596
ALTERNATIVE TOTAL LOST OPPORTUNITY DAMAGES	#1,601,452

BENSALEM TOWNSHIP BOARD OF SUPERVISORS

* * *

REGULAR MEETING

* * *

April 17, 1989
Bensalem, Pennsylvania

* * *

BEFORE:

JACK MAHER - CHAIRMAN
JOSEPH FRANCANO
PATRICIA ZAJAC
DAVID COSTELLO
JOSEPH RYAN

EMIL F. TOFTEN, ESQ. - Solicitor
CARMEN RADDI - Township Manager
HERBERT SCHEUREN, JR., - Township Engineer

* * *

MR. FRANCANO: Aye

MR. RYAN: Aye

MR. MAHER: Number 11 is the consideration of alteration of land permits for Blanche Road Associates, 454 Wells Drive, tax parcel 2-70-7-8.

MR. KOZIP: William Kozip, attorney for Blanche Road Associates.

I think what has been presented to you, there are some recommendations made by the township engineer. I have some questions relating to those recomendations made as to each one

of those applications for land alteration. Do you w3ant to take them all at one time or separately?

MR. TOFTEN: I think it would be easier to take them separately.

Are you talking about the engineers's letters?

MR. KOZIP: That is correct. I assume that the Board is going to consider the engineer's letters as part of their decision making process.

MR. TOFTEN: Then it is easier to take it one at a time.

MR. KOZIP: They are all the same letters except for some changes and some key language.

MR. TOFTEN: For purposes of the record, we will take them one at a time.

MR. KOZIP: Have Mr. Toften identify the first one and we will go one at a time.

MR. MAHER: 1454 Wells Drive.

MR. KOZIP: I have noted all the comments that have been made by Mr. Bacoria and the issue I have, I don't see any of those specific references in the ordinance dealing with land alteration permit and how they relate to the particular application. All of the references made to Mr. Bacoria's report deals with the land developed subdivision. None of it deals with the land alternation ordinance.

MR. TOFTEN: Mr. Scheuren, can you go through that for the Board?

MR. SCHEUREN: Number one is the authority approval which every applicant which comes in front of the Board of Supervisors must comply with.

Number two, national inventory wetlands--that is a federal jurisdiction dealing with the state and federal government.

MR. KOZIP: Can you relate where that appears in the ordinance for land alteration?

MR. TOFTEN: It does not have to. It is a federal law.

MR. KOZIP: But is does not apply to land alteration permits. I direct you attentio nto the ordinance itself. I have had numerous coversations with Mr. Scheuren on that particular issue. When you are talking about a land development plan, I may concur that may have some applicationability. We are talking about a land alteratio permit. They are not the same thing.

MR. SCHEUREN: The one question I put fort is -- you are saying that your're exempt from any federal --

MR. KOZIP: I am not saying we are exempt. All I am stating to you is I want you to relate the recommendations you make in your letter to the application for land alteration permit and what the ordinance requires. I will be happy to supply you with a copy of the ordinance and what it addresses itself to and thus far all the comment that are set forth in here have no relationship to what the ordinance concerns itself with.

MR. SCHEUREN: Are you developing a piece of ground?

MR. KOZIP: No. We are not developing a piece of ground not defined by both your own ordinance and the municipal planning code. It is one building on one lot.

MR. TOFTEN: These applications, if I understand them, were filed prior to the effective date of the new act. Is that correct?

MR. KOZIP: That is correct. All four of them.

MR. TOFTEN: Item two would not apply notwithstanding and I think the only thing the engineer would like is some commitment, either a FEMA permit or a waiver would be obtained.

MR. KOZIP: What we have done in the past, we have provided to him from Delaware Valley Soil Consultant's an inventory and identification of whether the properties lie in the wetlands.

MR. TOFTEN: Is that acceptable?

MR. SCHEUREN: We have not received anything.

MR. KOZIP: That has been acceptable to you?

MR. SCHEUREN: That would be acceptable.

MR. TOFTEN: As I understand, maybe there a little misunderstanding here. Mr. Scheuren is saying if you provide this information, he will recommend approval.

MEMBER OF THE AUDIENCE:[3] We have the information right here.

MR. TOFTEN: Let's go. What else do you object to, Bill?

MR. SCHEUREN: The contours, Mr. Misner, his engineer, is well awar of this, that all contours are based on the township authority __

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[3] The member of the audience was Wolfe Czekay, respondent's principal.

MEMBER OF THE AUDIENCE: There is a manhole on the plan. Show us an ordinance 212 where that is a requirement.

MR. KOZIP: In the past we have submitted applications for the land alteration permits in the past and the analysis that has been given to us by the township engineer is the past has never required any of these standards or any of these criteria, and there has been no change in the ordinance from the time we submitted these application before to the present. What I don't understand is why we have this different criteria being applied to us at the present time.

MR. TOFTEN: How is item four handled before in the development of other lots, Mr. Kozip?

MR. KOZIP: Item number four -- it was not handled in the application for land alteration permits.

MR. TOFTEN: How about item five?

MR. KOZIP: Five has nothing to do with land alteration permits again.

MR. TOFTEN: Site meaning s-i-t-e.

MR. KOZIP: Site lighting must be shown on the plan. I assume that is lighting that is going to emanate from the building.

MR. SCHEUREN: According to another ordinance, you are not allowed to exceed you property boundaries by greater than .3 foot.

MR. KOZIP: My question is you is what does that have to do with land alteration?

MR. SCHEUREN: You do have numberous -- if your effect another property owner's lot, then you are violation of the ordinance.

MR. KOZIP: Would you like me to read the purpose of this ordinance? What does that use of the light or candle power have to do with contours and surface water? That is what I don't understand.

MR. SCHEUREN: It all boils down to the fact that if you are in violation of other ordinances by discharging your water in somebody else's property, by lighting up your ground and exceeding your boundaries by another ordinance requirement, now you are in violation of other ordinances.

MR. KOZIP: But these are from the land development subdivision ordinance.

MR. SCHEUREN: That is correct.

MR. KOZIP: And you have yet to establish what we are involved in is in this development subdivision. We are building one building on one lot.

MR. SCHEUREN: It is kind of hard to believe you are not developing a piece of ground.

MR. KOZIP: All I can say to you is I would rely upon the definition in your own ordinance and the definition--

MR. TOFTEN: Mr. Kozip, would you agree item six is a valid consideration?

MR. KOZIP: I have no problem with number six and we are prepared to submit that type of information.

MR. TOFTEN: Okay. What about item seven?

MEMBER OF THE AUDIENCE: Item seven is a phone call and a sticker. It is done all the time.

MR. TOFTEN: Will comply on item seven.

MR. KOZIP: Sure.

MR. TOFTEN: Will comply on six, will comply on two.

MR. KOZIP: Sure. Two.

MR. TOFTEN: How about the monument situation, number eight?

MR. KOZIP: As far as I understand, monuments were always considered by the engineer at the time he makes his final inspection for an occupancy permit.

MEMBER OF THE AUDIENCE: We are getting out of line. You gave us land development plan modules for all 31 lots. We have them in our possession. When we subpoenaed your documents you gave them to us, so the land development was done many, many years ago in the whole property. It only has to be done once. You don't go back and do individual lots. Once it is done, it is done forever. Is that correct, Mr. Toften?

MR. TOFTEN: Not forever. Just for a certain time. Five years I think it is.

MEMBER OF THE AUDIENCE: Or any extension thereof.

MR. SCHEUREN: Most of these items can be covered by notes right on the plans

MR. TOFTEN: On the notes on the plans at the present time.

MR. SCHEUREN: This information was excluded from the plans and left off which it can be very easily put on by Mr. Checki (sic).

MR. TOFTEN: I think he's indicated he will comply with seven.

With respect to eight, if you are doing land alteration, wouldn't it be feasible to put the monuments in after the land -- after the land alteration has been done so -- not involve the monuments? Sometimes if you have the monuments in now for each lot in this subdivision?

MEMBER OF THE AUDIENCE: It was not required. Only on the curves and certain sections there are monuments there under the ordinance.

MR. SCHEUREN: It is just by note-- a little square block on each corner of the lot and a note on the side indicating--

MR. TOFTEN: You only want it on the plan?

MR. KOZIP: In the past, it has been taken care of when you have done inspection for the occupancy permit, not necessarily with this particular stage of the property.

You are saying just a note -- I would like you just to indicate --

MR. TOFTEN: If you will comply with some of these things, the Board will move to approve it conditionally.

MR. CHECKI: Fine. We are done to number nine.

MR. TOFTEN: This is a critical area, number nine.

MR. CHECKI: This is right. Those calculations, I believe, have been done for six of the lots previously, submitted to Mr. Scheuren. Are they in your possession?

MR. SCHEUREN: Calculations --

MR. TOFTEN: Are the water runoff calculations by lot or by project?

MEMBER OF THE AUDIENCE: By project. That is done by project. The whole project has been done many, many years ago.

MR. SCHEUREN: Where on Blanche Road? Is this the very end lot on the right-hand side?

MEMBER OF THE AUDIENCE: This is lot 1.

MR. SCHEUREN: That is in the back. We have not received calculations.

MR. TOFTEN: Do you have them available?

MEMBER OF THE AUDIENCE: No, because the calculations were done years ago. That is why the storm system was put in for the whole development.

MR. TOFTEN: What engineer did it?

MEMBER OF THE AUDIENCE: Darrah. It was approved with the land development. When it was approved in '72 --

MR. TOFTEN: Ordinarily it would be the property owner's engineer.

MEMBER OF THE AUDIENCE: Back then the township engineer was allowed to work privately.

MR. TOFTEN: I see what you mean. He did it.

MEMBER OF THE AUDIENCE: For the whole property.

MR. TOFTEN: How do you prove that?

MR. KOZIP: I have got a storm water system.

MEMBER OF THE AUDIENCE: That was approved. When it was approved back then, the density was much higher that it was today.

MR. SCHEUREN: The actual storm water calculation --

MEMBER OF THE AUDIENCE: It must have been somewhere in the files.

MR. KOZIP: It should be in the township files. We will take a look. We will make an effort to locate those calculations for you.

Number ten --

MR. TOFTEN: Are you claiming you are not willing to make a donation to the township?

MR. KOZIP: Not the way you phrased it. The issue is are we subject to the dollar eighty per square foot road impact tax. Our position is no, we are not subject to it.

MR. TOFTEN: What is that?

MR. KOZIP: Because first of all, we are not involved with land development and secondly, the entire project was approved by this Board prior to the enactment of that particular ordinance.

MR. TOFTEN: Although the subdivision was approved, was the land development approvement at that time?

MEMBER OF THE AUDIENCE: Yes.

MR. KOZIP: If we did not have the land development approved, we could not have gotten any building out of you previously.

MR. TOFTEN: I cannot remember the effective date of that ordinance off the top of my head.

MR. KOZIP: I believe it was June of '87 something like that.

Again, I also raise the issue of what this has to do with the land alterations.

MR. TOFTEN: My recommendation to the Board is to approve the land alteration plan conditionally based on the compliance with items one -- one you say you will comply?

MEMBER OF THE AUDIENCE: It is just a matter of putting a note on it.

MR. TOFTEN: One, two, three, five, six --

MR. SCHEUREN: Number four is a note also that can be placed on the plan.

MR. KOZIP: Mr. Toften, can we identify what requires notes versus what requires actual performance?

MR. SCHEUREN: One is a note. Two is from Del-Val (sic). Three is just a revision. Four is a note

MEMBER OF THE AUDIENCE: What are you talking about, sidewalks?

MR. SCHEUREN: Your service walks, four inch concrete on four inches of stone. Just a service walk from your building to your parking lot.

MR. TOFTEN: You just want to insert that in there, concrete service walk?

MEMBER OF THE AUDIENCE: There is no sidewalk in the development. It is just the location of your light on the building with a typical isometric diagram on the side of the building. It is a note.

MEMBER OF THE AUDIENCE: The land development subdivision ordinance, doesn't that deal with violating -- not violating because I read it the other day. I was looking for it myself. It deals with proposed street lighting.

MR. SCHEUREN: Each developer, when he comes in, he also shows on his plans lighting plans, and --

MR. TOFTEN: For the parking lots.

MEMBER OF THE AUDIENCE: I know what it is.

MR. TOFTEN: Are you purchasers requiring lots to be put up in the construction in your parking lot detail?

MEMBER OF THE AUDIENCE: We always put them up. They are on the electric plan. It is just not on the site plan.

MR. SCHEUREN. Six is a note. Seven is a note. Eight is a note. Ten is the calculations.

MR. KOZIP: Excuse me?

MR. SCHEUREN: Nine.

MEMBER OF THE AUDIENCE: We have no knowledge where they are at. It has nothing to do with us.

MR. SCHEUREN: We will research the township and see what they have --

MR. TOFTEN: Item ten, if you follow the 80 cent per square foot road improvement tax -- it was passed subsequent to the approval of the extension of this, then it is not applicable at

least to this application. Assuming that is so which I don't know yet --

MR. KOZIP: What is the key factor?

MR. TOFTEN: The key factor would be the date and whether or not any of the extensions fell within that time frame. If you have an extension that falls -- if the extension occurred during a time period that they passed the ordinance, then it would apply.

Understand what I am saying?

MR. KOZIP: No, I don't. Why don't you say that very clearly for the record so I can understand it?

MR. TOFTEN: All I am saying is I don't think that we have to worry about that at this point in consideration of the land alteration permit. What I am saying is there may be other factors and just because this development has peculiar extensions which go back so long, you had a time period of about ten years before an extension was granted and then two subsequent extensions. I cannot remember off the top of my head what the extensions were. If the extensions occurred --

MR. KOZIP: The final extension agreement was in effect during the time --

MR. TOFTEN: What was the date, the last extension agreement as opposed to the date --

MEMBER OF THE AUDIENCE: They were both done on the same day. I am making it easy for you.

MR. TOFTEN: Then it applies.

MR. KOZIP: No, because the extension agreement does not incorporate any changes made in the land development subdivision ordinance.

MR. TOFTEN: It does not have to.

MR. KOZIP: Then we will be able to litigate that issue as well.

MR. TOFTEN: All I am saying is the Board does not have to make that decision on item number ten because it is not related to --

MEMBER OF THE AUDIENCE: Who does it?

MR. TOFTEN: We may have to do it in court.

MEMBER OF THE AUDIENCE: We intend to.

MR. KOZIP: Ten is not going to be considered by the Board. Is that correct?

MR. TOFTEN: Not as a condition for land alteration permit, but as a condition for occupancy.

MEMBER OF AUDIENCE: That is part of the land development subdivision ordinance. That's 399.

MR. TOFTEN: I will address that issue to the Board. I am just not prepared to do it tonight.
Go ahead.

MR. KOZIP: That finishes up letter number one.

MR. TOFTEN: A motion is appropriate. I suggest that the Board hold that item ten out. I don't think it is required with respect to the land alteration permit. It may be required at some later time if I give the Board an opinion that it does or does not apply.

MR. MAHER: Motion to approve with those conditions.

MRS. ZAJAC: So moved.

MR. FRANCANO: I'll second it.

MR. TOFTEN: With respect to the other three --

MR. KOZIP: There are three additional ones besides the one we just did.

MR. TOFTEN: We have a motion and a second. Can I call the vote:

MRS. ZAJAC: Aye.

MR. COSTELLO: Aye.

MR. MAHER: Aye.

MR. FRANCANO: Aye.

MR. RYAN: Aye.

MR. MAHER: Nowe we will go to number two. 1418 Wells Drive, 2-33-118.

MR. SCHEUREN: Item number one is the authority approval. Item number two is a planned revision and a note.

MEMBER OF AUDIENCE: Would you accept the developer's agreement for the water and sewer for the whole project being able to obtain water and sewer?

MR. SCHEUREN: This is basically for the connection.

MEMBER OF THE AUDIENCE: Most of the connection fees have been paid already under the developer's fees.

MR. SCHEUREN: This is acceptable then.

MEMBER OF AUDIENCE: Fine.

MR. SCHEUREN: Item number three is notes on the plan, site and lighting plan. Just basically a note.

Number four is a note. Number five is a note. Number six, a note, is --

MR. RYAN: Again we are going to do the same as we did in number ten.

MR. TOFTEN: Excluding item six, if the developer will stipulate that he will comply by note or plan revision unless there's one that you take exception to, Mr. Kozip?

MR. KOZIP: Can I just ask the engineer for clarification?

MR. TOFTEN: Which item?

MR. KOZIP: In comparison to the letter he directed to Mr. Raddi dated December 29, 1988. He refers to what we have submitted as a proposed land development plan.

I am going back to the first letter. There's a discrepancy or inconsistency.

MR. TOFTEN: I don't have that letter in front of me.

MR. KOZIP: The first letter we dealt with, December 29. The first one we dealt with, he refers to our application as a reviewing -- a proposed land development plan and then on the letter that we just had gone over, he refers to the review as a review of a proposed alteration of land permit.

I would like to know if that is an error --

MR. SCHEUREN: Secretarial error.

MR. TOFTEN: In the heat of dictation, even attorneys make mistakes.

MR. KOZIP: Even you, Mr. Toften, I have been told on occasion.

Number threee, ready to go to the next letter.

MR. SCHEUREN: We need a motion on this one.

MR. MAHER: I will accept the motion to consider the alteration of land permit, 2-33-118 excludig item six on the review.

MR. RYAN: I'll second it.

MR. MAHER: I'll make the motion. You seconded it.

MRS. ZAJAC: Aye.

MR. COSTELLO: Aye.

MR. MAHER: Aye.

MR. FRANCANO: Aye.

MR. RYAN: Aye.

MR. MAHER: Letter number three, how about tax map 2-33-123, lot number 11.

MR. SCHEUREN: Number one is a note. Number two is a note plan revision. Number three is a note. Number four is a note. Number five is a note. Number six is a note. Number seven is a plan revision. Number eight is --

MR. TOFTEN: That is just a note or a legend.

MR. KOZIP: Number seven is a note as well. What that has to do with land alteration permit --

MR. TOFTEN: In the interest of cooperation, you are going to comply.

MR. SCHEUREN: Number eight is a note. Number nine you are going to submit -- we are going to look up the calculations.

MEMBER OF THE AUDIENCE: Let me ask you a question. What happens if you don't find the calculation? It's been approved and it really has nothing to do with us.

MR. TOFTEN: Is the storm drainage observable from any open --

MEMBER OF THE AUDIENCE: It is a whole plan, whole system.

MR. FRANCANO: Why is the burden of proof on the township to provide these things? Shouldn't the burden of proof be on the developer?

MR. KOZIP: Mr. Francano --

MR. FRANCANO: I am asking my solicitor a question.

MR. TOFTEN: Ordinarily these things are worked out in advance and should not even come to the Board before they have at least been discussed. If there are problem areas, generally if there's been some communication, I don't know what the situation is that engineering details like this are worked out with an indication with the developer.

MR. FRANCANO: My question is -- you still have not answered it. The answer is that it should not be listed until these things have been addressed or an indication that there will be a compliance. Apparently these reviews were existing or some place in the township had been misplaced or not timely brought before the Board.

MR. FRANCANO: Is it proper procedure for the developer to put the burden of proof on the township? Shouldn't the developer provide these things to the township?

MR. TOFTEN: There is always a question of interpretation. I think what their position is, this is only a land alteration permit. At least for these four lots -- this is not the normal land development process and that these items are being addressed one, because of the age of the property, the age of the development and the question about the extension, and I think what you have here is an effort by the property owner and his counsel to address them realistically.

MR. FRANCANO: That is what we are trying to do.

MR. TOFTEN: It should be done outside the context of the meeting in my opinion.

MEMBER OF THE AUDIENCE: I will tell you the reason we asked. The last permit that I filed for, the format did not change. Lot 25 right through the alteration of land permit -- no letters, no nothing, just at the bottom.

MR. TOFTEN: Bear with me. Sometimes when you have a change in the law like that --

MR. KOZIP: Can I just address your issue. We are just confused about the review letters that we received on these land alteration permits.

MR. FRANCANO: Absolutely, and you have since agreed to everything that has been on there, so I don't understand the problem.

MR. KOZIP: The problem is because we never were told when these were to be notes or in what forms they were to take.

MR. FRANCANO: We have seen hundreds of people come up here in the three-and-a-half years I have been here and we have never had this problem and they do it.

MR. KOZIP: This particular development we always seem to have some unique problems.

MR. SCHEUREN: Mr. Mixner has been in front of this Board hundreds and hundreds of times and these notes are things that come up on his plans, not only on Blanche Road, but --

MR. RYAN: All his plans.

MR. TOFTEN: There's a pattern with that engineer is what he is saying.

Let me tell you, Mr. Kozip, he is right.

MR. KOZIP: Fine. All I am saying to you is I have some difficulty applying this criteria to the land alteration process. We are willing to go as long as we get verification. That is all we are trying to obtain from you tonight.

MR. SCHEUREN: There is one lot that I am particularly concerned about, all the way down to the right, this lot.

MEMBER OF THE AUDIENCE: Yes.

MR. SCHEUREN: According to the contours that were shown, the entire site drains over onto -- out into Blanche Road and then over on top to Franklin Commons.

MEMBER OF THE AUDIENCE: No, it does not. What it does do, there's a drain from the end of Blanche Road. Blanche Road stops short of the proerty line. There is a drainage swale that goes all the way down those back lots and goes back to the creek.

MR. SCHEUREN: I have some videotape from the last rain showing the water coming down.

MEMBER OF THE AUDIENCE: That is because we are in the process of working on lot number 12 and the people behind us are dumping water.

MR. TOFTEN: What is that other property?

MEMBER OF THE AUDIENCE: The crossroads behind us. They are also doing the site work.

MR. TOFTEN: The last item, number ten --

MR. MAHER: I will accept the motion to approve the alteration of land permit for 2-33-123, lot 11.

MRS. ZAJAC: So moved.

MR. TOFTEN: With the exception of item nine which will be researched, I believe. Is that correct, and item ten is excluded at this time.

MR. MAHER: With those exceptions.

MRS. ZAJAC: I'll second it. Aye.

MR. COSTELLO: Aye.

MR. MAHER. Aye.

MR. FRANCANO: Aye.

MR. RYAN: Aye.

MR. MAHER: Next is 4040/4060 Blanche Road.

MR. SCHEUREN: Item number one is a note for the plans or the approval by the authority. Item two is a plan

revision. Number three is the notes. Item number four is the notes. Item number five is the notes. Item number six we will look up and item number seven is with Emil.

MR. TOFTEN: Mr. Checki, will you and your attorney agree to comply with the engineer's request excluding item six and seven? Item six, if the information is available and item seven, subject to additional research?

MEMBER OF THE AUDIENCE: As long as it does not make us fall into the land development subdivision ordinance, I have got no problem with that.

MR. TOFTEN: The only ones you have to worry about is the ones you are going to build.

MR. MAHER: Motion to approve tax parcel 2-33-125, lot number 10, subject to the comments of our solicitor, Mr. Toften.

I'll make the motion.

MR. RYAN: I'll second it -- calculations on six and exception on seven.

MRS. ZAJAC: Aye.

MR. COSTELLO: Aye.

MR. MAHER: Aye.

MR. FRANCANO: Aye.

MR. RYAN: Aye.

MR. MAHER: Number twelve, reaffirmation of the final subdivision and land development plan for Hampstead Downs-Bristol Road.

MR. GOLDSTEIN: Gentlemen, Stephen goldstein, formerly representing Realty Engineering. I am now representing the Moore family.

You may or may not be aware of the fact that Hampstead Downs, the development on Bristol Road, your lot subdivision, Realty Engineering, had elected to sell the job. They are not going to build it. They have entered into an agreement with Ed Moore, Jr., who used to be with Realty for seven years. This is his father Ed Moore, Sr.

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
CIVIL ACTION - EQUITY

BLANCHE ROAD CORPORATION, a Pennsylvania corporation General Partner and trading as BLANCHE ROAD ASSOCIATES, I, a Pennsylvania Limited Partnership
Plaintiffs

No: 88-01355-05-5

vs.

BENSALEM TOWNSHIP

and

DANIEL STAERK, in his capacity as Director of the Department of Licenses and Inspections for Bensalem Township

and

WILLIAM R. OTTINGER, in his capacity as Code Enforcement Official for Bensalem Township
Defendants

Atty. I.D. No. 21585

STIPULATION OF COUNSEL

AND NOW, this 26th day of February, 1988, it is hereby stipulated and agreed by and between WILLIAM G. KOZUB, ESQUIRE, on behalf of and with the consent of the

Plaintiffs, Blanche Road Corporation, t/a BLANCHE ROAD ASSOCIATES, I, and EMIL F. TOFTEN, ESQUIRE, on behalf of and with the consent of the Defendants, Bensalem Township, DANIEL STAERK and WILLIAM R. OTTINGER, that the Plaintiffs' request for a Temporary or Preliminary Injunction in the above matter shall be withdrawn upon the following terms and conditions:

1. Upon the execution of this Stipulation by the parties, BENSALEM TOWNSHIP agrees to withdraw the Notice of Revocation directed to BLANCHE ROAD CORPORATION, t/a BLANCHE ROAD ASSOCIATES, I, on February 8, 1988;

2. Upon the execution of this Stipulation by the parties, BENSALEM TOWNSHIP agrees to reinstate the Building Permits for Lots #13, #14 and #26 in the Blanche Road Industrial Park, Bensalem, Pennsylvania;

3. BENSALEM TOWNSHIP agrees that a conditional Certificate of Occupancy shall be issued for the building located on Lot #7 of the Blanche Road Industrial Park, Bensalem, Pennsylvania provided that BLANCHE ROAD CORPORATION, t/a BLANCHE ROAD ASSOCIATES, I, completes, on or before June 1, 1988, the items identified as Nos. 1, 3, 4, 5, 6, and 7, in the Township Engineer's letter to BLANCHE ROAD CORPORATION, t/a BLANCHE ROAD ASSOCIATES, I, dated February 17, 1988, attached hereto, marked Exhibit "A" and made a part hereof;

4. BENSALEM TOWNSHIP agrees to reinstate the Land Alteration Permits for Lots #13, #14, and #26 in the Blanche Road Industrial Park, Bensalem, Pennsylvania provided that BLANCHE ROAD CORPORATION, t/a BLANCHE ROAD ASSOCIATES, I, complies with the Sedimentation and Erosion Control Plan prepared by Gilmore & Associates, dated February 4, 1988 and approved by the Bucks County Conservation District on February 8, 1988 and which is attached hereto, marked Exhibit "B" and made a part hereof, and continues to implement said Plan in accordance with the

Inspection Report issued by the Bucks County Conservation District on February 25, 1988, which is attached hereto, marked Exhibit "C" and made a part hereto together with nine (9) photographs, attached hereto, marked Exhibit "D" (1-9) and made a part hereof.

5. Upon the execution of this Stipulation by the parties, it is agreed that the terms and conditions set forth herein shall be incorporated into a proposed Order to be submitted to the Court; and

6. The parties agree that this Stipulation is entered without prejudice to the rights of all parties in this matter, including but not limited to, all defenses, whether factual or legal, which may be raised by the Defendants in this matter in the pleadings or in the event of a final hearing on Plaintiffs' Complaint in Equity.

IN WITNESS WHEREOF, the foregoing is duly stipulated by counsel.

Date: 2/26/88

_____

WILLIAM G. KOZUB, ESQUIRE

Date: 2-26-88

_____

EMIL F. TOFTEN, ESQUIRE

APPROVED BY THE COURT

_____

HON. ISAAC GARB, J.

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
CIVIL ACTION - EQUITY

BLANCHE ROAD CORPORATION, a Pennsylvania corporation General Partner and trading as BLANCHE ROAD ASSOCIATES, I, a Pennsylvania Limited Partnership
Plaintiffs

No: 88-01355-05-5

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and

DANIEL STAERK, in his capacity as Director of the Department of Licenses and Inspections for Bensalem Township

and

WILLIAM R. OTTINGER, in his capacity as Code Enforcement Official for Bensalem Township
Defendants

Atty. I.D. No. 21585

ORDER

AND NOW, this 26th day of February, 1988, upon consideration of the attached Stipulation, it is hereby directed that the following shall be entered as a Stipulated Order in lieu of Plaintiffs' request for a Temporary or Preliminary Injunction:

1. Defendant, Bensalem Township, shall forthwith withdraw the Notice of Revocation issued to the Plaintiffs on February 8, 1988;

2. Defendant, Bensalem Township, shall forthwith reinstate the building permits necessary for the construction of buildings and improvements on Lots #13, #14, and #26 located in the Blanche Road Industrial Park;

3. Defendant, Bensalem Township, shall forthwith issue a conditional Certificate of Occupancy for the building located on Lot #7 of the Blanche Road Industrial Park under and subject to the requirement that plaintiffs complete those conditions established by the Township Engineer for Bensalem Township as more fully described in Paragraph 3 of the attached Stipulation;

4. Defendant, Bensalem Township, shall forthwith reinstate the land alteration permits for Lots #13, #14, and #26 under and subject to the requirements that the Plaintiffs comply with the Sedimentation and Erosion Control Plan prepared by Gilmore & Associates dated February 4, 1988 and approved by the Bucks County Conservation District on February 8, 1988, and continue the implementation of said Plan in accordance with the inspection report issued by the Bucks County Conservation District on February 22, 1988; and

5. All other terms and conditions of the attached Stipulation are incorporated herein by reference.

The foregoing Order is entered without prejudice to either party's rights or liabilities in this matter, including without limitation, all claims or defenses which may be asserted by the parties in the pleadings or in a final hearing.

BY THE COURT:

_____

HON. ISAAC S. GARB, J.

February 17, 1988

Mr. Carmen Raddi, Manager
Township of Bensalem
3800 Hulmeville Road
Bensalem, PA 19020

Reference: Final Inspection for Occupancy Permit
4080 Blanche Road
Bensalem, PA 19020

Dear Mr. Raddi:

As per the request of the developer, we have made a final inspection of the above-referenced site. As a result of an inspection, we have found the following deficiencies:

1. The five (5) street trees, as shown on the plans, have not been installed.
2. The curbing along the front of the property has deteriorated beyond repair. The curbing must be replaced in accordance with Bensalem Township specifications.
3. The property corners have not been set with monuments or iron pins.
4. The parking lot has several low areas that are retaining water. These areas must be reshaped to allow for proper drainage.
5. The parking area, by the eastern entrance to the site, must be cut out, the base restabilized, and the surface course installed.
6. The entire rear of the property has evidence of soil erosion and sediment runoff problems. This area must be stabilized until adequate ground cover has been established.
7. The grass area around the sewer vent must be restabilized with additional dirt.

Therefore, based on our inspection of the referenced site, we recommend the above deficiencies be completed prior to issuing the occupancy permit.

Should you have any questions, please do not hesitate to call.

Very truly yours,

ENVIRONMENTAL ENGINEERING
KINETICS INTERNATIONAL,
INC.

Herbert T. Scheuren, Jr.
Bensalem Township Engineer

HTS:cbs

cc: Bensalem Township Supervisors
Mr. Daniel Steark, Director of L & I
Mr. Emil F. Toften, Esq.
Blanche Road Industrial Park

March 2, 1988

Mr. Carmen Raddi, Manager
Township of Bensalem
3800 Hulmeville Road
Bensalem, PA 19020

Reference: Review of the Proposed Alteration of Land Permit
Blanche Road Associates I
1418 Wells Drive
T.M.P. # 2-33-118, Lot No. 15

Dear Mr. Raddi:

As per your request, we have reviewed the proposed Alteration of Land Permit of 1481 Wells Drive, as prepared by Joseph H. Mixner, dated February 11, 1989. The applicant proposes to construct a 12,200 S.F. - one story warehouse building within the M-1 zoning district. However, as a result of our review of the plans submitted, we have found the following comments:

1. (Sec. 302.E. 5 & 6) - Approval must be obtained from the Bensalem Township Authority for the proposed water and sewer connections.

2. (Sec. 302.D.8.) - The Bensalem Township Subdivision and Land Development Ordinance requires the contours to be based on Bensalem Authority Datum.

3. (Sec. 9.k.2.6) - A proposed sight lighting plan and detail must be submitted for review.

4. (Sec. 302.C.) - The soils classification lines must be shown on the plans.

5. (Sec. 302.D.9.5.E) - A street tree and concrete sidewalk detail must be shown on the plans.

6. (Ord. 399, Act. VI, Sec. 600.C. 1 & 2) - The applicant will be subject to the $1.80 per square foot road improvement tax for the 12,200 S.F. of building space proposed.

Therefore, as a result of our review of the plans dated February 11, 1989 of 1418 Wells Drive, we recommend the Board of Supervisors request the applicant to resubmit the plans with the above comments incorporated into the design.

Should you have any questions, please do not hesitate to call.

Very truly yours,
D.V.C.E., Inc.

Nandi R. Thakuria, P.E.

cc: Bensalem Township Supervisors
Mr. Daniel Staerk, Director of L&I
Mr. Emil F. Toften, Esq.
Blanche Road Associates
Joseph H. Mixner

December 29, 1988

Mr. Carmen Raddi, Manager
Township of Bensalem
3800 Hulmeville Road
Bensalem, PA 19020

Reference: Review of Land Development Plans
Philadelphia Decal, Inc.
c/o Blanche Road Associates
T.M.P.# 2-70-7-10

Dear Mr. Raddi:

As per your request, we have reviewed the proposed Land Development Plans of Philadelphia Decal, Inc. as prepared by Joseph H. Mixner dated September 16, 1988, last revised December 3, 1988. The applicant proposes to construct a 34,344 square foot warehouse building within the M-1 zoning district. However, as a result of our review of the plans submitted, we have found the following comments:

1. Approval must be obtained from the Bensalem Township Authority for the proposed water and sewer connections.
2. In reviewing the "National Wetland Inventory Map" we have found the site to be located within the proximity of delineated wetland. We therefore, recommend a wet- land study be completed and submitted to the township as well as the Army Corp of Engineers for their review and approval.
3. The Bensalem Township Subdivision and Land Development Ordinance requires all contours to be based on Bensalem Township Authority Datum.
4. A landscaping and concrete sidewalk detail must be shown on the plans.

5. The proposed lighting must be shown on the plan.
6. The soil types must be shown on the plans, special attention must be given for wet soils if found on site.
7. An Act 172 utilities compliance must be shown on the plans.
8. Monuments must be placed on all corners of the proposed site.

9. The plans do not indicate storm water management facilities to control the sites storm water.
10. Calculations and revised plans must be submitted for review.

Therefore, as a result of our review of the plans dated December 3, 1988 of Philadelphia Decal, Inc., we recommend the applicant resubmit the plans with the above comments incorporated into the design.

Should you have any questions, please do not hesitate to call.

Very truly yours,
D.V.C.E., Inc.

Nandi R. Thakuria, P.E.

cc: Bensalem Township Supervisors
Mr. Daniel Staerk, Director of L&I
Mr. Emil F. Toften, Esq.
Blanche Road Associates